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Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1988

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner

vs.

STATE FARM INSURANCE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Statement of Question Presented for Review

STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Were federal constitutional guarantees of due process and equal protection violated by the Pennsylvania state courts, when a civil litigant's right to an appeal on the merits, guaranteed by state law, was denied solely because the trial court clerk failed in his duty to compile the original record, and the litigant never had notice of defects in the record or any ability to correct them?

(Not addressed by the Pennsylvania courts, although presented below.)

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Petition and Reference to Opinions Below

Petition

In the Supreme Court of the United States

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner

v.

STATE FARM INSURANCE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Morris M. Shuster and William D. Marvin respectfully present this Petition for Writ of Certiorari to the Superior Court of the Commonwealth of Pennsylvania.

REFERENCE TO OPINIONS IN THE COURTS BELOW

The opinions of the Common Pleas Court of Philadelphia County, Pennsylvania, have not been not reported [Appendix (hereinafter: "App.") 13a, 30a]. The memorandum opinion of the Superior Court of Pennsylvania is not published, but the disposition is listed in a table at 520 A.2d 68 (1986) [App. 1a]. The per curiam ruling of the Supreme Court of Pennsylvania, dismissing the appeal as improvidently granted, is reported at ___ Pa. ___, 550 A.2d 198 (1988) [App. 10a].

Jurisdiction

GROUNDS FOR JURISDICTION

The Petitioner claims his federal constitutional rights were violated by the September 25, 1986 Order of the Superior Court of Pennsylvania, the state's intermediate appellate court, which dismissed and quashed two consolidated appeals without reaching their merits, because of defects in the preparation of the original record by the trial court clerk [App. 4a-6a, 9a].

Mr. Neyhard, the Appellant below and Petitioner herein, filed an Application for Reargument with the Superior Court on October 3, 1986. Although not required by Pennsylvania Rules of Appellate Procedure, when filed such a petition tolls the time for seeking review in the state Supreme Court. Pa. R.A.P. 1113(a). The Superior Court denied the Petition for Reargument on November 10, 1986 [App. 42a].

Mr. Neyhard then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on December 9, 1986, within the 30-day period allowed by Pennsylvania rules. Pa. R.A.P. 1113(a). In addition to raising state law issues, this Petition presented express arguments that the Superior Court action violated Mr. Neyhard's federal due process and equal protection rights. Statement of the Case, infra, at p. 9. On December 2, 1987, the Pennsylvania Supreme Court granted the Petition, exercising its discretionary jurisdiction to hear an appeal from the intermediate appellate court. 42 Pa. C. S. §724.

After briefing, the Pennsylvania Supreme Court heard oral argument on October 26, 1988. On November 14, 1988, the Pennsylvania Supreme Court dismissed the appeal "as improvidently granted," one justice dissenting [App. 10a]. No opinion or other explanation was issued by the Court.

Jurisdiction

That dismissal made the Superior Court's Order final, and left the federal constitutional claims, triggered by the intermediate court's action and pressed in Mr. Neyhard's Petition and Brief to the state Supreme Court, effectively denied for jurisdictional purposes.

This Court has certiorari jurisdiction under 28 U.S.C. §1257(a), over the state court ruling because a "right ... is specially set up or claimed under the Constitution." Jurisdiction is over the Pennsylvania Superior Court, unless the Pennsylvania Supreme Court's action in dismissing the discretionary appeal was a "decision." See infra, at pp. 15-16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part: "nor shall any State deprive any person of ... property, without due process of law."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part: "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

3. The Pennsylvania Constitution, Article V, §9, provides, in pertinent part, that: "[t]here shall be a right of appeal ... from a court of record ... to a court of record or to an appellate court, the selection of such court to be as provided by law."

4. The Pennsylvania Consolidated Statutes, Title 42, §742, provides, in pertinent part, that "[t]he Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas."

5. Pennsylvania Rule of Appellate Procedure 1921 provides:

> The original papers and exhibits filed in the lower court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.

6. Pennsylvania Rule of Appellate Procedure 1931(c) provides, in pertinent part:

> When the record is complete for purposes of the appeal, the clerk of the lower court shall transmit it to the prothonotary of the appellate court. The clerk shall number the documents ... and shall transmit with the record a list of the documents correspondingly numbered and identified.

STATEMENT OF THE CASE

I. Background Facts And State Law Issues

In 1980, the Pennsylvania Supreme Court held that work loss benefits for lost income, mandated by the state's Motor Vehicle No-Fault Insurance Act, former 40 P.S. §1009.101 et seq. [repealed 1984], continued to accrue to victims of fatal motor vehicle accidents after their death. *Allstate Insurance Co. v. Heffner*, 491 Pa. 447, 421 A.2d 629 (1980), *aff'g* 265 Pa. Superior Ct. 181, 401 A.2d 1160 (1979). Later, that court made it clear that decedents' estates, as well as statutory "survivors", could recover these "postmortem work loss" benefits. *Freeze v. Donegal Mutual Insurance Co.*, 504 Pa. 218, 470 A.2d 958 (1983).

State Farm denied Mr. Neyhard's written claim for such benefits for his deceased son's estate. Thereafter, on March 4, 1981, Mr. Neyhard filed this class action in the Philadelphia Common Pleas Court, seeking benefits for his deceased son's estate and a similarly situated class of estates.

On July 26, 1985, the Philadelphia court certified this case as a class action, but limited the class to Philadelphia-related claims [App. 24a-25a]. Mr. Neyhard, as class representative, appealed that part of the order denying a statewide class to the Pennsylvania Superior Court, at No. 2141 Philadelphia 1985.[1]

[1] Pennsylvania law, in contrast with federal practice, permits an immediate appeal when the trial court refuses to certify a class. *Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 348 A.2d 734 (1975).

While Mr. Neyhard appealed the certification ruling, two of the excluded class members filed a class action in another county, on behalf of all non-Philadelphia claimants. State Farm removed that case to federal court under diversity jurisdiction, where it has been certified for a state-

Eight months later, the trial court granted summary judgment against Mr. Neyhard's individual claim, ruling that the statute of limitations was not tolled by an earlier class action, *Nye v. Erie Insurance Exchange, et al.*, 504 Pa. 3, 470 A.2d 98 (1983) (class action could not be maintained against "non-transactional" insurance company defendants like State Farm). However, the trial court did not dismiss the class action count, but made provision that a class member with a timely claim could request to be substituted as class representative. Order, March 26, 1986 [App. 39].

Mr. Neyhard appealed the ruling on his individual claim to the Superior Court, at No. 1072 Philadelphia 1986. By this time, the certification appeal had been briefed and argued. On July 25, 1986, the Superior Court consolidated the two appeals and set an accelerated briefing schedule for the individual appeal [App. 11a-12a].

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wide class, excluding only the Philadelphia claims which remain as members of the *Neyhard* class. *Kromnick et al. v. State Farm*, 112 F.R.D. 124 (E.D. Pa. 1986). The *Kromnick* action is pending before Hon. Donald W. VanArtsdalen, in the Eastern District of Pennsylvania, Civil Action No. 85-5824.

Most recently, the parties in the *Kromnick* action have been designating test cases for trial, selected to embody the issues each party wishes to contest. One issue most persistently raised by State Farm is its defense that the statute of limitations was not tolled for unnamed class members who were originally putative members of the *Neyhard* class. Such tolling, State Farm contends, is only available within the *Neyhard* action, not the successor *Kromnick* action, even though the *Neyhard* trial court made express provisions for preservation of those claims when it refused to certify them in Philadelphia [App. 25a]. Because this contention threatens hundreds of outstanding claims, Mr. Neyhard's appeal on the certification issue remains important to those class members.

II. Facts Giving Rise To This Petition

By memorandum opinion dated September 25, 1986, the Superior Court panel majority dismissed the individual appeal because of defects in how the *original* record was prepared by the trial court's clerk [App. 4a]. Specifically, that court complained that exhibits and pleadings filed in the trial court had been placed in large envelopes, without numbering and indexing, and that certified docket entries were not provided.

The procedural rules cited by the panel direct the clerk of the lower court to prepare the record [App. 4a-5a]. The opinion did not suggest that any of the defects in the record could be attributed to the Appellant, Mr. Neyhard.

The panel majority then quashed the certification appeal, on grounds that dismissal of Mr. Neyhard's individual appeal, and hence his claim, deprived him of standing as class representative. The panel majority went on to state that the defects in the original record would have required dismissal in any event [App. 6a].

One judge of the panel dissented, stating that he would reach and decide the merits of the appeals [App. 8a].[2]

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[2] On those merits, while the appeals were pending in the Superior Court, that Court issued precedential decisions favoring Mr. Neyhard's position in each appeal, decisions not available to the *Neyhard* trial court: *Cambanis v. Nationwide Ins. Co.*, 348 Pa. Super. 41, 501 A.2d 635 (October 11, 1985) (statewide class action for postmortem work loss benefits should be certified); *Miller v. Federal Kemper Ins. Co.*, 352 Pa. Super. 581, 508 A.2d 1222 (April 28, 1986) (*Nye* action did toll statute of limitations until non-transactional insurers were finally dismissed), *overruled Cunningham et al. v. Insurance Company of North America*, 515 Pa. 486, 530 A.2d 407 (1987).

Reversal of the trial court's forum-county restriction, consistent with *Cambanis*, would have restored about 800 potential members to the class, each with claims for at least $15,000 plus 18% annual interest and attorney fees.

After the Superior Court denied Mr. Neyhard's Petition for Reargument, he filed a timely Petition for Allowance of Appeal with the Pennsylvania Supreme Court. That court first allowed the appeal, but after oral argument, dismissed the appeal as improvidently granted on November 14, 1988.[3] [App. 11]. This Petition for Certiorari is being filed within ninety days of that final action of the highest state court.

Mr. Neyhard's federal claims arose when the Pennsylvania Superior Court, on its own motion and without notice to either party, dismissed his appeals. The Petition for Reargument filed in the Superior Court was primarily addressed to state law issues: that state procedural rules and practice required a remand to correct the technical defects in the record, because the Appellant had complied with every rule. That Petition included

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On the statute of limitations defense, the *Miller* precedent then in effect would have required reinstatement of Mr. Neyhard's individual claim if the second appeal had been decided on its merits rather than being dismissed because of the lower court's clerical failings.

[3] While Mr. Neyhard's Petition for Allowance of Appeal was pending before the Pennsylvania Supreme Court, that court overruled the *Miller* holding in *Cunningham v. Insurance Company of North America*, 515 Pa. 486, 530 A.2d 407 (1987).

After the Petition was granted, allowing his appeal, Mr. Neyhard further petitioned the state Supreme Court to allow briefing on the statute of limitations issue, contending that *Cunningham* was distinguishable on its facts and would not control his individual appeal. The Pennsylvania Supreme Court denied this Petition. See Order of February 25, 1988 [App. 11a]. The appeal was thereby limited to the questions presented in the Petition for Allowance of Appeal. Pa. R.A.P. 1115(a)(3). These questions only raised procedural and constitutional issues arising from the Superior Court's refusal to decide the merits of the statute of limitations and certification issues in the respective appeals.

a brief argument that the dismissal violated Petitioner's constitutional rights, especially his state constitutional right to an appeal.[4]

Mr. Neyhard raised federal constitutional issues in the "Questions Presented" and "Reasons for Allowance of Appeal" parts of his Petition for Allowance of Appeal in the Pennsylvania Supreme Court. In separate, detailed sections, that Petition expressly cited federal constitutional provisions, along with comparable state guarantees. The Due Process and Equal Protection clauses of the Fourteenth Amendment were cited, as was federal case law including *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950).

In his Petition, Mr. Neyhard argued that the action below denied his federal procedural due process rights to notice and hearing, because he had no notice of any defects in the records, and because the state procedural rules did not make an appellant responsible for supervising the job performance of the trial court clerk [Petition, 23-25). The Petition went on to argue that the dismissal of his appeals violated his due process right to fundamental fairness, by punishing without fault on his part [Petition, 25-26]. Finally, Mr. Neyhard pointed out that forfeiting his fundamental right to an appeal on the merits, guaranteed by the state constitution, did not bear even a rational relationship to the desired end, to encourage court clerks to do their jobs. Thus, the action of the Superior Court violated Mr. Neyhard's equal protection rights [Petition, 26-27]. After the appeal was granted, Mr. Neyhard's Brief incorporated and summarized these federal claims [Brief for Appellant, 27-28].

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[4] Under Pennsylvania law, a petition for reargument or reconsideration is not required as a condition of further appellate review. Therefore, failure to raise all possible issues in such a petition, if filed, does not waive higher appellate review. *City of Philadelphia v. Tasker*, ___ Pa. Commonwealth Ct. ___, 547 A.2d 1261, 1264 (1988). This issue is discussed infra, pp. 26-28.

If the Pennsylvania Supreme Court's dismissal, after accepting an appeal, is equivalent to outright denial of the Petition for Allowance of Appeal, then the intermediate court was the highest state court from which a decision could be had. Thus, this Petition requests a Writ of Certiorari directed to the Pennsylvania Superior Court, whose action in dismissing and quashing two appeals is at issue.

In the alternative, a writ is requested to the Pennsylvania Supreme Court, on the basis that its unexplained dismissal of an appeal, after full briefing and oral argument, may amount to a finding that Mr. Neyhard's federal claims did not warrant relief. This jurisdictional question is discussed infra, pp. 15-16.

ARGUMENT

I. Summary Of Reasons For Grant Of Certiorari

A. Pennsylvania court system destroyed Petitioner's constitutional rights through its own mistakes.

This Court has regularly and consistently enforced Due Process and Equal Protection guarantees when civil litigants have been denied a hearing on their substantive rights, through arbitrary or unfair actions of state courts. The unusual feature of this case is that the Petitioner's rights were destroyed *solely through the court system's own mistakes*. The Superior Court, upon finding that the trial court clerk had not certified or indexed the original record, chose to dismiss and quash the appeals, rather than take steps to solve the problem. Such steps, expressly authorized by Pennsylvania's appellate rules, could include giving the parties notice of the problem and an opportunity to be heard on the appropriate remedy, and directing the lower court to complete the preparation of the record. Pa. R.A.P. 1926. Mr. Neyhard had no ability to compel the trial court clerk to do his job correctly, and he was not even aware of the problem before the Superior Court terminated his rights.

Thus, Mr. Neyhard's own appeal and the chance to restore a statewide class with aggregate claims worth millions of dollars were dismissed by the Superior Court, even though he was innocent of any procedural default either as individual or as class representative. This was callous, arbitrary state action, regardless of whether Mr. Neyhard or the class would have won either appeal on the merits.[5]

[5] The injustice caused by the Superior Court's action is heightened because, shortly before dismissing Mr. Neyhard's appeals, that same Court had decided two other cases which indicated that Mr. Neyhard would prevail on both appeals. See Statement of the Case, supra, p. 7, n. 2.

Argument

The facts in this case do not present any delicate balancing of opposing interests to determine the precise outer limits of the constitutional guarantees which conflict with a valid state interest. Rather, this case presents an absolute, random forfeiture, without precedent and unjustified by even a colorable state interest.

There are no jurisdictional or prudential obstacles to this Court's review, because the federal issues were thoroughly raised in the state Supreme Court. Infra, p. 14. Mr. Neyhard's right to an appeal is guaranteed by state law, and thus is a property right. Petitioner was denied due process when his appeals were lost on procedural grounds without notice, without hearing, and without any fault on his part. Infra, pp. 17-20. The Pennsylvania courts also violated Mr. Neyhard's equal protection rights because there was no rational basis for their action. Infra, pp. 21-23. Finally, no adequate, independent state basis can be identified, even after indulging in speculation about possible grounds for the result below. Infra, pp. 23-30.

B. Importance of review in this case.

This Court should grant review to emphasize that the Due Process clause of the Fourteenth Amendment will not allow state courts to deliberately punish innocent litigants for a court's own procedural mistakes.

If a state appellate court needs an indexed, certified original record to decide the merits (even in the absence of any factual dispute), and the state rules compel the court clerk to compile that record, those rules define the quantum of "process due." An appellant who pays a filing fee and complies with all the rules is entitled to compliance by the court clerk. A party should not be punished for the court clerk's failings.

If substantive rights can be abolished whenever a court clerk fails to tabulate properly filed papers for appellate review,

then no rights are safe. As this Court has noted: "[t]erminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 n. 10, 71 L.Ed.2d 265, 279 n. 10, 102 S.Ct. 1148, 1158, n. 10 (1982).

By allowing the result in this case to stand despite a detailed presentation of federal due process and equal protection claims, the Pennsylvania Supreme Court has effectively decided important federal questions in conflict with this Court's decisions. Supreme Court Rule 17.1(c).

If procedural guarantees to enforce substantive rights are as fragile as Mr. Neyhard has experienced, then accountability, consistency, and confidence are lost. The uniform availability of a reasoned appellate decision is an important deterrent to abuse and corruption. When a state, by constitution and statute, guarantees such an appeal, the state may not dispense with the guarantee just because its own agents commit clerical error.

> [T]he deprivation here is final .... A system or procedure that deprives persons of their claims in a random manner ... necessarily presents an unjustifiably high risk that meritorious claims will be terminated.

Logan, 455 U.S. at 434-35, 71 L.Ed.2d at 277, 102 S.Ct. at 1157. Public confidence in the administration of justice depends on the expectation that cases will be decided on their merits.[6]

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[6] Regrettably, it must be recognized that Pennsylvania courts do not enjoy a high level of public confidence. See, e.g., *In the Matter of Cunningham, et al.*, 517 Pa. 417, 538 A.2d 473 (1988) (eight Philadelphia judges removed or suspended from office for taking cash "gifts" from Roofers Union officer).

For years, controversy has touched the administration of Pennsylvania courts: "overall, the quality of justice in Pennsylvania is stained,

Argument

The present case is such a dramatic, extreme violation of the Due Process guarantee that it cannot be tolerated as an aberration, but calls for review and correction by this Court.

II. Jurisdiction Exists Because Federal Claims Were Pressed In State Court

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A. Federal claims were pressed and implicitly rejected in state court.

This Court's certiorari jurisdiction is provided by 28 U.S.C. §1257(a). As amended in 1988, jurisdiction by writ of certiorari exists over "final judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution."

Federal issues were thoroughly raised in Mr. Neyhard's Petition for Allowance of Appeal, which was filed with the Pennsylvania Supreme Court. Statement of the Case, supra, p. 9. By granting the Petition and accepting the appeal, the highest Pennsylvania court had ample opportunity to decide whether the federal constitution could tolerate imposition of this judicial forfeiture on an innocent appellant. When the Pennsylvania Supreme Court dismissed the appeal "as improvidently granted," refusing to decide these issues, it rejected all Mr. Neyhard's claims for relief, including his federal constitutional claims. Because the rule against reviewing federal issues which were "not pressed or passed upon below" is fully satisfied, the "unsettled question" whether that rule is jurisdictional or prudential is not

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poisoned by political manipulation, favor-trading, nepotism, sloth, mismanagement, incompetence and worse." Editorial, *Philadelphia Inquirer*, November 11, 1984, page F-6. Although Mr. Neyhard is the apparent victim of incompetence, not corruption, the state of affairs in Pennsylvania shows that the need for vigilance is real, not theoretical.

presented. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 100 L.Ed.2d 62, 72, 108 S.Ct. 1645, 1651 (1988).

B. Because the Pennsylvania Supreme Court granted but then dismissed a discretionary appeal, the Superior Court's judgment appears to be subject to certiorari jurisdiction.

If the Pennsylvania Supreme Court had denied Mr. Neyhard's Petition for Allowance of Appeal at the outset, it is settled that certiorari jurisdiction would exist over the judgment of the Pennsylvania Superior Court, because that intermediate appellate court was the highest state court in which a decision could be had. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 96 L.Ed.2d 426, 107 S.Ct. 2520 (1987).

In this case, the Pennsylvania Supreme Court first allowed a discretionary appeal, but then dismissed it without explanation, "as improvidently granted."

A similar procedural posture arose in *Pennsylvania v. Finley*, 481 U.S. 551, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987), where this Court assumed jurisdiction over the Pennsylvania Superior Court, after the state Supreme Court granted but later dismissed a discretionary appeal. The majority opinion in *Finley* did not discuss that appeal and dismissal, but granted certiorari and reversed the Superior Court's decision on the merits. The dissenting justices in *Finley* noted the procedural history in urging that an independent state ground could have supported the decision below. 481 U.S. at ___, 95 L.Ed.2d at 552 n. 8, 107 S.Ct. at 1995 (Brennan, J., dissenting); 481 U.S. at ___, 95 L.Ed.2d at 556, 107 S.Ct. at 2001 (Stevens, J., dissenting).

This Court did discuss the effect of a state high court's summary dismissal of an appeal from the intermediate court in *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 93 L.Ed. 449, 107 S.Ct. 499 (1986). The *R.J.*

Argument

Reynolds case held that if a state Supreme Court had jurisdiction over an appeal from a lower court, dismissal of that appeal would be presumed to be a decision on the merits, in the absence of "positive assurance to the contrary," i.e., that the state court lacked jurisdiction and did not reach the merits in any fashion. 479 U.S. at 138, 93 L.Ed. at 460-61, 107 S.Ct. at 506.

The Pennsylvania Supreme Court exercises discretionary appellate jurisdiction whether or not constitutional issues are raised. The Pennsylvania Supreme Court had jurisdiction when it allowed Mr. Neyhard's appeal from the Superior Court; the subsequent "improvidently granted" dismissal could, under *R.J. Reynolds*, be presumed to reflect a finding that none of Mr. Neyhard's claims, including his federal constitutional claims, warranted relief.

However, one distinctive feature in *R.J. Reynolds* was that North Carolina's judicial statute provides an appeal as of right to the state Supreme Court over "substantial" constitutional claims. When this Court spoke of the appellate jurisdiction of the state Supreme Court, it may have referred only to mandatory jurisdiction imposed by statute, rather than discretionary jurisdiction.

If review is granted in this case, this Court could clarify whether the *Reynolds* presumption is limited to situations where the state Supreme Court summarily dismisses an appeal granted as of right by state statute, or extends to cases like this one, where the state Supreme Court allowed an appeal but dismisses it without explanation, after full briefing and argument.

This Petition requests a Writ of Certiorari to the Pennsylvania Superior Court, on authority of the implicit holding in *Pennsylvania v. Finley*, supra. In the alternative, if the reasoning of *R.J. Reynolds* does apply, a writ is requested to the Pennsylvania Supreme Court.

Argument

III. Due Process

A. Petitioner's right to an appeal on the merits is a property interest.

A state, through legislation or case law, may elect not to confer a property interest. However, once such a right is conferred, it may not be taken away without appropriate safeguards. *Vitek v. Jones,* 445 U.S. 480, 490-91 n. 6, 63 L.Ed.2d 552, 100 S.Ct. 1254 (1980).

Pennsylvania law grants litigants an unqualified right to an appeal, on express authority of the state constitution and a related statute. "There shall be a right of appeal ... from a court of record ... to a court of record or to an appellate court, the selection of such court to be as provided by law." Pennsylvania Constitution, Article V, §9. The Pennsylvania legislature has given the Superior Court "exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas" except where jurisdiction is vested in the Supreme or Commonwealth Courts. 42 Pa. C. S. §742. See *Stout v. Universal Underwriters Insurance Company,* 491 Pa. 601, 605, 421 A.2d 1047, 1049 (1980) (right to appeal is founded on state constitution).

"The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Logan v. Zimmerman Brush Co.,* 455 U.S. at 430, 71 L.Ed.2d at 274, 102 S.Ct. at 1155, *citing Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11-12, 56 L.Ed.2d 30, 98 S.Ct. 1554 (1978). In *Logan,* this Court traced the broad scope of property interests deserving due process protection. To paraphrase the opinion in *Logan,* "it would require a remarkable reading of a 'broad and majestic ter[m],' ... to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to [appellate review on the merits of state law issues] is not." 455 U.S. at 431, 71 L.Ed.2d at 275, 102 S.Ct. at 1155 (citations omitted).

Argument

B. Petitioner was denied due process when his appeals were dismissed without notice, without hearing, and without fault on his part.

The Due Process clause of the Fourteenth Amendment prevents the states from denying litigants "use of established adjudicative procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' " *Logan*, 455 U.S. at 429-30, 71 L.Ed.2d at 274, 102 S.Ct. at 1154, *quoting Boddie v. Connecticut*, 401 U.S. 371, 380, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971). If a state provides a right to appeal, the process must meet minimum requirements of due process and equal protection. *Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963).

The due process requirement of meaningful access extends to appeals in civil cases. This Court has held that Due Process was denied by an appellate hearing in which one of nine state Supreme Court justices had a personal stake in similar litigation. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580, 1587 (1986).

"Since Texas has created an appeal as of right from the trial court's judgment, it cannot infringe on this right to appeal in a manner inconsistent with due process or equal protection." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 22, 95 L.Ed.2d 1, 22-23, 107 S.Ct. 1519, 1531 (1987) (Brennan, J., concurring).[7]

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[7] Significantly, Mr. Neyhard's case presents none of the factors which, in *Pennzoil v. Texaco*, led every member of this Court to reject Texaco's due process attack on Texas rules requiring a supersedeas bond in order to stay execution on a money judgment pending appeal.

The *Pennzoil* majority ruled that the *Younger* abstention was required because Texaco had neither attempted to raise its federal claims in the Texas state courts before instituting a collateral attack in federal district court, nor shown that such efforts would be futile. 481 U.S. at 10-13, 95 L.Ed.2d at 18-20, 107 S.Ct. at 1525-27. Similarly, Justice Blackmun concurred on grounds that under the *Pullman* case, federal courts should abstain from deciding federal challenges to state procedures until pos-

Argument

Due process cannot permit a state to destroy a person's right to an appellate hearing through mistakes of the state's own officials. For example, where a state provided an administrative remedy for employment discrimination against handicapped persons, a claimant could not be denied a hearing and decision on the merits because the state agency failed to schedule a conference within a statutory time limitation. *Logan v. Zimmerman Brush*, 455 U.S. at 434-35, 71 L.Ed.2d at 277, 102 S.Ct. at 1157.

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sible state law resolutions had been explored. 481 U.S. at 27, 95 L.Ed.2d at 27, 107 S.Ct. at 1534. (Blackmun, J., concurring). Because the Pennsylvania Supreme Court heard but rejected Mr. Neyhard's federal claims, the abstention doctrines of *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) and *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643 (1941), are inapplicable here.

Justice Brennan concurred in the result, on grounds that Texas procedures did not deprive Texaco of its appeal rights; even if forced to declare bankruptcy in order to stay execution, Texaco could still go forward with its appeal from the underlying judgment. 481 U.S. at 22, 95 L.Ed.2d at 23, 107 S.Ct. at 1532 (Brennan, J., concurring). Similarly, Justice Stevens found Texaco's constitutional claims without merit, because the case did not involve "an absolute deprivation of the opportunity to appeal." 481 U.S. at 32, 95 L.Ed.2d at 29-30, 107 S.Ct. at 1537 (Stevens, J., concurring). Here, in contrast, Mr. Neyhard did suffer "absolute deprivation" of his appeal in the most literal sense.

Justice Marshall found jurisdiction lacking, because the collateral relief sought by Texaco was "inextricably intertwined" with the merits of the state court appeal. 481 U.S. at 24-25, 95 L.Ed.2d at 24-25, 107 S.Ct. at 1533 (Marshall, J., concurring). However, this case is not a collateral attack having "the odor of impermissible forum-shopping." *Id.* The merits of the state law issues play no part in this case. Even if Mr. Neyhard were bound to lose his appeals on the merits, he is entitled to that appellate determination by the state courts. See infra, §V-A, p. 23.

Thus, this case presents none of the factors which undercut the federal claims in *Pennzoil*. Mr. Neyhard seeks direct review of state court action which arbitrarily and absolutely terminated his appeals, without any fault on his part, after full but futile presentation of his federal claims to the highest state court.

Argument

In *Logan*, the claimant had notice of the untimely conference date. However, in the present case, the state appellate court sent Mr. Neyhard notices upon receipt of the original record, which were form letters without a hint of any defect or problem with the record [R.R. 104a]. Mr. Neyhard did not even learn of the fatal defect before his appeals were dismissed.

As in *Logan*, here "it is the state system itself that destroys a complainant's property interest." 455 U.S. at 436, 71 L.Ed.2d at 278, 102 S.Ct. at 1158. This destruction was permitted by the Pennsylvania Supreme Court when it dismissed Mr. Neyhard's appeal raising federal constitutional issues, even though that court observed in another case: "[t]here is no point in contending that a procedural rule may exist that punishes without fault, and is yet consistent with Due Process." *Craig v. Magee Memorial Rehabilitation Center*, 512 Pa. 60, 65, 515 A.2d 1350, 1353 (1986).

The Due Process clause must be enforced to assure that a court system cannot deny substantial justice rather than correct its own clerical errors. A citizen's expectation that court officials will comply with the court system's own rules, and will correct their own mistakes, is inseparable from Due Process. The most elaborate and sensitive procedural guarantees are worthless if they evaporate whenever a court clerk omits to perform his ministerial duty.[8]

Whether the state system destroyed petitioner's rights "through negligence, maliciousness, or otherwise," *Logan*, 455 U.S. at 436, 71 L.Ed.2d at 278, 102 S.Ct. at 1158, the destruction of Mr. Neyhard's right to an appellate decision on the merits was a blatant deprivation of due process.

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[8] This threat to traditional standards of justice is exacerbated, not excused, by the fact that the Superior Court employed an unpublished memorandum opinion, which may not be cited as precedent, to dismiss Mr. Neyhard's appeals. "Notice to the Bar," 520 A.2d 63, 68. This practice, although necessitated by the court's workload, reduces accountability for reasoned, consistent decision-making. It calls for greater vigilance; not, as State Farm suggested below, an increased margin of tolerable error whereby the rights of innocent parties can be destroyed.

Argument

IV. Equal Protection

As applied by the Pennsylvania courts, the Pennsylvania Appellate Rules imposing record-preparation duties on trial court clerks create two classes of appeals: those in which the clerks perform their mandatory duty to certify and index the original record, and those in which they do not. The first group of appellants receives rulings on the merits. The second group, even though meeting every obligation the rules impose on them, suffers the "extreme action of dismissal." *Stout*, supra, 491 Pa. at 604-05, 421 A.2d at 1049.

Justice Powell's concurring opinion in *Logan* described an equal protection violation in clear and concise fashion, which closely fits the circumstances of this case:

> Under this classification, claimants with identical claims, despite equal diligence in presenting them would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time ... The State no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end—or indeed any other—in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so.

455 U.S. at 444, 71 L.Ed.2d at 283, 102 S.Ct. at 1162 (Powell, J., concurring).

Like the claimant in *Logan*, Mr. Neyhard had no power to compile the original court record, or compel the trial clerk to do his duty. It is equally unfair and irrational to punish him for the clerk's failure.

Pennsylvania cannot, and does not purport to, have a legitimate interest in punishing parties for a court clerk's mistakes. Only the remedy of remand, with directions for the clerk to perform his duty, would promote the goal of obtaining properly

compiled records on appeal. The Pennsylvania Appellate Rules call for liberal construction and allow appellate courts to disregard the requirements of most rules, "to secure the just, speedy and inexpensive determination of every matter." Pa. R.A.P. 105.[9]

Furthermore, while Mr. Neyhard's appeal was pending before the Pennsylvania Supreme Court, the state rule addressing "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal" was amended. Pa. R.A.P. 902. The amendment, effective January 31, 1987, deleted an explicit reference to dismissal, "in favor of a preference toward remanding the matter to the lower court so that the omitted procedural step may be taken." Rule 902, Explanatory Note. The Pennsylvania Supreme Court's Order promulgating this amendment

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[9] Pennsylvania courts have frequently ignored procedural defects in order to decide appeals cases on their merits, even when an appellant could be found at fault.

For example, in *Stout v. Universal Underwriters Insurance Company*, 491 Pa. 601, 421 A.2d 1047 (1980), appellants filed a notice of appeal in the trial court, but failed to perfect the appeal in the Superior Court until one day after a motion to quash was filed. 491 Pa. at 603, 421 A.2d at 1048-49. The Superior Court granted the motion to quash, but the Pennsylvania Supreme Court reversed:

> The extreme action of dismissal should be imposed by an appellate court sparingly, and clearly would be inappropriate when there has been substantial compliance with the rules and when the moving party has suffered no prejudice.

Id. at 604, 421 A.2d at 1049. See also *Miller v. Commonwealth of Pa., Unemploy. Comp. Bd. of Rev.*, 505 Pa. 8, 476 A.2d 364, 367 (1984) (appellant failed to attach the Post Office form showing timely mailing: "a fair and just interpretation of our rules makes a dismissal improper"); *Laczkowski v. Laczkowski*, 344 Pa. Superior Ct. 154, 161 n. 4, 496 A.2d 56, 59 n. 4 (1985) (where issues had been briefed and argued, court reached merits despite failure to file exceptions below); *Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, etc.*, 338 Pa. Superior Ct. 257, 487 A.2d 953 (1985) ("inexcusable" failure to conform to rules "not so egregious" as to require sanctions); *Commonwealth v. Stoppie*, 337 Pa. Superior Ct. 235, 486 A.2d 994 (1984) (appellant's briefs showed "almost complete disregard" of the rules).

stated that it was to apply to pending matters, "insofar as just and practicable." 16 Pa. Bulletin 4951 (1986). However, that court did not explain why the "preference toward remanding" was not honored in Mr. Neyhard's then-pending case.

As in *Logan*, "the State's abandonment of the challenged practice makes it difficult to argue that requiring a determination on the merits will impose undue burden on the state administrative process." *Logan*, 455 U.S. at 436 n. 10, 71 L.Ed.2d at 279 n. 10, 102 S.Ct. at 1158 n. 10. In contrast with *Logan*, what happened in this case affects every appellant. Even the former version of Rule 902, much less the amended version, did not impose sanctions on an innocent appellant. Since due process and equal protection violations in this case were not prevented by either version of Rule 902, the 1986 rule amendment gives no assurance that such violations will not recur. Without this Court's intervention, future appellants, even those who comply with the state procedural rules in every literal detail, may continue to find their rights at the mercy of an inept court clerk.

V. No Independent State Ground, Procedural Or Substantive, Can Excuse Denial Of Constitutional Right To Appeal On The Merits

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A. No independent state procedural ground could justify action below.

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1. *State Farm has offered reasons for ruling which have no support in record.*

In the Pennsylvania Supreme Court, State Farm raised two procedural arguments to avoid Mr. Neyhard's claims that his constitutional right to an appeal on the merits was unfairly denied. First, State Farm attempted to blame Mr. Neyhard for the clerk's mistakes in compiling the record, citing certain

rules, not mentioned by the Superior Court, which give parties an option to inspect the original record and petition the court to correct omissions. Second, State Farm argued that Mr. Neyhard did not raise constitutional issues with enough specificity in his Petition for Reargument to the Superior Court, and therefore waived them [Brief in Opposition to Petition for Allowance of Appeal, 4-7].

The discussion of why these arguments have no merit under Pennsylvania law, infra, 24-28, must proceed with a caveat: nothing in the record suggests that either issue was an actual basis for the decision below. The Superior Court panel majority explained its decision entirely in terms of the trial clerk's omissions, and did not cite any default on Mr. Neyhard's part. The Pennsylvania Supreme Court gave no reason for rejecting Mr. Neyhard's constitutional claims when it concluded that appeal by allowance had been "improvidently granted."

The absence of any evidence invokes the rule that federal issues will not be presumed to be mooted by an independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1037-44, 77 L.Ed.2d 1201, 1212-16, 103 S.Ct. 3469, 3474-78 (1983). State Farm, as the proponent of a mootness argument, cannot meet its "heavy burden" of demonstrating that federal claims are not properly at issue. *Id.* at 1042 n. 8, 77 L.Ed.2d at 1215 n. 8, 103 S.Ct. at 3477 n. 8.

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2. *Pennsylvania Rules make the trial court clerk solely responsible for preparing the original record on appeal.*

In the only appellate opinion below, the Superior Court based its dismissal on the condition of the original record —documents were not numbered or indexed, and docket entries were not certified [App. 4a]. That opinion did not contain the slightest hint that any of these defects could be attributed to the Appellant, Mr. Neyhard. The court cited Appellate Rules which place that duty entirely upon "the clerk of the lower

court." Pa. R.A.P. 1921, 1931(c). Comments published with these Rules explain why this duty must rest with the lower court, not the litigant:

> The lower court has direct control over the official court reporter and clerk of the lower court, and it is inappropriate (and not infrequently ineffective), for counsel for the losing party below to be responsible for goading the court reporter to transcribe the notes of testimony, the judge to write an opinion, and the judge and clerk to certify and transmit the record, all within the time provided by these rules.

Note, Rule 1935 (Legal Intelligencer, 1984 ed.).

Undeterred by the lack of any express rule or case law imposing responsibility for the original record on appellants, State Farm has argued that the Superior Court acted properly on the basis of rules not cited or discussed by that court, Pa. R.A.P. 1926 and 1934.

Rule 1926 provides for correction of the record by stipulation or court action: "if anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court ... or the appellate court, on proper suggestion or of its own initiative, may direct" correction. Far from authorizing dismissal, Rule 1926 demonstrates that the lower court should be ordered to correct formal defects in the record.

Rule 1934 provides for notice to the parties when the record is filed in the appellate court. The Superior Court sent such notices in this case when the original record was received in each appeal, notices which were routine and regular, containing no indication of any defects or inadequacies in the record as filed [R.R. 104a].

Thus, Mr. Neyhard's alleged failure to anticipate, discover and correct the non-feasance of the trial court clerk cannot constitute an independent state ground for dismissal of his appeals.

It was the Superior Court, not Mr. Neyhard, who violated Rule 1926 by failing to direct correction of the record, when it had exclusive knowledge of the defects.

Far from relying on an adequate state ground, the Pennsylvania appellate courts created a "novel procedural requirement" by the sanction imposed in this case. State Farm's speculation that Mr. Neyhard should bear retroactive responsibility for the court clerk's failings is the opposite of a "firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-49, 80 L.Ed.2d 346, 353, 104 S.Ct. 1830, 1835 (1984).

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3. *Federal issues were not waived.*

As a predicate for this Court's review, whether jurisdictional or prudential, federal issues must be pressed in or decided by the state courts, if only in a petition for reconsideration to the highest state court. See, e.g., *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 819, 89 L.Ed.2d at 831, 106 S.Ct. at 1584. This requirement was satisfied by the presentation of federal constitutional issues in the Petition for Allowance of Appeal, which was granted by the Pennsylvania Supreme Court.

Even though this federal test is met, a claimant's violation of state procedural requirements for raising a constitutional issue can be a proper independent state ground for rejecting a federal constitutional claim. However, state rules can work such a waiver only if they are "firmly established and regularly followed." *James v. Kentucky*, supra. This test cannot be met under Pennsylvania law.

Mr. Neyhard had no federal claims before his appeals were terminated by the Superior Court, without prior notice to him of any defects in the record, or any opportunity to be heard. This point is undisputed.

Argument

Mr. Neyhard's Application for Reargument to the Superior Court detailed the fundamental unfairness of punishing an innocent appellant for mistakes of a court clerk. Assuming that an express reference to the denial of constitutional rights, contained in that Application [pp. 5, 8][10] was inadequate to raise federal claims, that is of no consequence, because Pennsylvania does not apply a waiver rule to petitions for reargument. The Pennsylvania Commonwealth Court recently faced a similar situation in *City of Philadelphia v. Tasker*, ___ Pa. Commonwealth Ct. ___, 547 A.2d 1261, 1264 (1988). In that case, the City, seeking to overturn an injured plaintiff's verdict, filed post-trial motions which were dismissed for failure to meet the local court's briefing schedule. The City then filed a petition for reconsideration with the trial court, which was denied. On appeal, the plaintiff contended that issues not raised in the reconsideration petition were not preserved for appeal. ___ Pa. Commonwealth Ct. at ___, 547 A.2d at 1263.

The Commonwealth Court held that the alleged failure to raise all issues in the petition for reconsideration was of no consequence, because "[t]here is no requirement ... that a party file a motion for reconsideration raising an issue that it seeks to raise on appeal in order for that issue to be a reviewable issue on appeal." ___ Pa. Commonwealth Ct. at ___, 547 A.2d at 1264.

Thus, State Farm's waiver argument is not based on a "firmly established and regularly followed" rule in Pennsylvania. Pennsylvania's practice is to the contrary, that no waiver

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[10] Because fundamental fairness is the essence of due process, the arguments contained in that Application were closely related to constitutional analysis. Petitioner does not concede that constitutional issues were not raised in the Superior Court. However, it is unnecessary to decide that question because the Petition in the state Supreme Court, not the Application for Reargument to the intermediate court, was the critical juncture.

rule applies to a petition for reconsideration. Although the proceedings in this case occurred at a higher level of review than in *Tasker*, supra, the applicable rules have the same effect: Pennsylvania appellate rules do not require a Petition for Reargument. Pa. R.A.P. 2543 (reargument before appellate court is not a matter of right); Pa. R.A.P. 1113 (if reargument not sought in intermediate court, petition to Supreme Court must be filed within 30 days).

Thus, as a matter of common sense, as well as the Pennsylvania practice described in *Tasker*, supra, failure to raise every potential issue in an optional Petition for Reargument cannot be deemed a waiver. Mr. Neyhard could have entirely omitted his Petition for Reargument, and there would be no possibility of a waiver if he raised all issues for the first time in a Petition for Allowance of Appeal in the state Supreme Court.

B. No independent state substantive ground could justify the action below.

In addition to unfounded procedural arguments, State Farm suggested to the Pennsylvania Supreme Court that its decision in *Cunningham v. Ins. Co. of North America*, 515 Pa. 486, 530 A.2d 407 (1987), disposed of Mr. Neyhard's individual claim on statute of limitations grounds. Therefore, State Farm argued that the denial of the procedural rights of Mr. Neyhard and his class to an appellate decision on the merits was immaterial.

Federal procedural rights cannot rise or fall on a litigant's probable chances of success on the merits. Such a rule would render every federal constitutional issue "inextricably intertwined" with the underlying state law claim. *District of Columbia Court of Appeals v. Feldman*, 462 U.S. 462, 483 n. 16, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983).

Argument

> Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil v. Texaco, 481 U.S. at 25, 95 L.Ed.2d at 25, 107 S.Ct. at 1533 (Marshall, J., concurring).

Thus, an inquiry into the likelihood of eventual success is impermissible and repugnant to the foundation of due process analysis. The record in this case illustrates the wisdom of this Court's insistence on a specific, clear statement of an independent state ground. State Farm's speculation about what the state courts would have decided if they reached the merits lacks a proper factual record, lacks an open presentation of the legal issues, and lacks any reasoned decisional process.

Contrary to State Farm's speculation, the record demonstrates that the Pennsylvania courts did not make any *sub silentio*, backdoor ruling on the merits of the individual appeal. When the Superior Court dismissed and quashed Mr. Neyhard's appeals, its own recent precedents indicated that he should have won on both counts. The Superior Court's opinion shows that the panel majority refused to consider the merits in any fashion, finding that the lack of an "official, duly certified record" prevented such review [App. 5a]. Later, Mr. Neyhard petitioned the Pennsylvania Supreme Court to permit briefing on the merits of his individual appeal—to allow that Court to reach and decide his contention that his case could be distinguished from *Cunningham v. Ins. Co. of North America*, supra, and therefore his claim was not time-barred. That petition was denied. Order, February 25, 1988 [App. 11a].

Thus, the issues in the state Supreme Court were defined by the "Questions Presented" section of the Petition for Allowance of Appeal. Pa. R.A.P. 1115(a)(3). Those questions did not go to the merits of either appeal. Because the Supreme Court

did not explain its "improvidently granted" dismissal of the appeal, refusing to answer the "Questions Presented," there is no basis to assume that the Court reached issues on the merits which were *not* presented in that appeal. Mr. Neyhard's chances of eventual success, if he had not been denied a decision on the merits, played no part in the result below, and cannot form an "independent state ground."

VI. CONCLUSION

Mr. Neyhard has suffered a blatant violation of his constitutional rights at the hands of the Pennsylvania court system. This Court is the last refuge for Mr. Neyhard and the class he represents to obtain vindication of these rights.

This Court should review this case to rectify the wrong done in this case, and to emphasize that the procedural rights of diligent litigants must be honored.

A writ of certiorari should issue to review the decision of the Pennsylvania Superior Court, or in the alternative, to the Pennsylvania Supreme Court.

Respectfully submitted,
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WILLIAM D. MARVIN
Attorneys for Petitioner
**Counsel of Record*

Memorandum Opinion

J.22002/86

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

v.

STATE FARM INSURANCE COMPANY

No. 2141 Philadelphia, 1985

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

v.

STATE FARM INSURANCE COMPANY

No. 1072 Philadelphia, 1986

Appeals from the Orders dated July 26, 1985, and April 8, 1986, in the Court of Common Pleas, Civil Division, of Philadelphia County, No. 608 March Term 1981.

Memorandum Opinion

BEFORE: CIRILLO, P.J., ROWLEY and WIEAND, JJ.

MEMORANDUM:

On February 2, 1978, Christopher K. Neyhard, a minor, died as a result of injuries he sustained as a passenger in a motor vehicle collision in Berks County, Pennsylvania. Plaintiff, Richard A. Neyhard, Administrator of the Estate of Christopher Neyhard, submitted to State Farm Insurance Co., Decedent's Pennsylvania No-Fault insurer, claims for medical benefits and work-loss benefits under the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §1009.101 et seq. State Farm paid the medical benefits but denied the work loss benefits. On March 4, 1981, plaintiff brought an assumpsit class action suit in Philadelphia County against State Farm for the work loss benefits. The statewide class which Neyhard purported to represent was "all other similarly situated legal representatives ... and/or survivors of deceased insureds of defendants who are entitled to work loss benefits pursuant to the No-Fault Act ... which benefits have been wrongfully denied to class members by defendant." (¶ 14, Plaintiff's Complaint.) There were almost 1,000 known potential members of this class residing in 64 of the 67 Pennsylvania counties.

On May 22, 1981, appellant filed a Motion for Class Certification. On October 22, 1984, a hearing was held on the motion, and July 26, 1985, the trial court entered an order which, in part, granted the class action, but only if: a) the accident occurred in Philadelphia County; or b) at the time of death, the decedent's residence was in Philadelphia County; or c) the administrator or executrix resides in Philadelphia County; or d) the Register of Wills of Philadelphia County has granted letters to an administrator or

executor; or e) an action seeking decedent's work loss benefits has been instituted in Philadelphia County as of the date of this order; and f) no action for work loss benefits instituted outside of Philadelphia County is pending.

The basis for limiting the certified class to those with a nexus to Philadelphia was the court's concern for the impact the action would have on the already overburdened Philadelphia County courts, the availability of the courts in all other counties in which the individual actions could be brought to process the claims, and the possibility that claimants, their witnesses, or their attorneys may have to travel to Philadelphia for hearings. On August 9, 1985, Neyhard, on behalf of the class, filed an appeal from the order certifying the class at 2141 Philadelphia 1985. In this appeal, he argues that the certified class should not have been limited only to those having a connection to Philadelphia County.

While the appeal at 2141 Philadelphia was pending, the trial court entered an order on April 8, 1986 upon consideration of State Farm's Motion for Summary Judgment, Neyhard's answer thereto and Cross-Motion for Summary Judgment, State Farm's Reply to the Cross-Motion, and numerous memoranda prepared by both parties. This order dismissed Neyhard's individual claim because it was barred by the No-Fault statute of limitations, 40 P.S. §1009.106(c)(1). Neyhard appealed from this order on April 16, 1986 at 1072 Philadelphia 1986. On appeal he raises only one issue: whether his membership in the class action seeking recovery of post-mortem work loss benefits in *Nye v. Erie Insurance Exchange,* 504 Pa. 3, 470 A.2d 98 (1983), tolled the statute of limitations while State Farm was a defendant in *Nye*.

Memorandum Opinion

On June 25, 1986, this Court *sua sponte* ordered consolidation of these two appeals inasmuch as our decision in the appeal at 1072 Philadelphia 1986 might affect the decision at 2141 Philadelphia 1985. We dismiss the appeal at 1072 Philadelphia 1986 and quash the appeal at 2141 Philadelphia 1985.

The record transmitted to this Court by the Philadelphia County Prothonotary at both 2141 Philadelphia 1985 and 1072 Philadelphia 1986 includes two series of papers and documents held together with brass fasteners, one transcript and two large envelopes, one labelled "plaintiff's exhibits" "1 of 2," and the other labelled "2 of 2." A list of docket entries is included on the top of each of the series of papers and documents and is located in several places throughout the series of papers and documents. The docket entries have not been certified to this Court, none of the documents have been numbered, and there is no list identifying each document and giving it a number corresponding to the numbers which were supposed to be placed on each document. Moreover, motions and a memorandum of law, rather than exhibits, are located in the second exhibit envelope, and these documents, as well as others within the series of papers and documents, are not included on any of the copies of the docket entries.

Pa.R.A.P. 1921 states:

> the original papers and exhibits filed in the lower court, and a *certified copy of the docket entries* prepared by the clerk of the lower court shall constitute the record on appeal in all cases. (Emphasis added.)

And Pa.R.A.P. 1931(c) provides:

> ... the clerk of the lower court *shall number the documents comprising the record and shall transmit with*

> *the record a list of the documents correspondingly numbered and identified with reasonable definiteness.* (Emphasis added.)

Because the docket entries have not been certified, because none of the documents were numbered, and because no list identifying the documents by number and by description was transmitted with the record, both Rule 1921 and 1931 (c) have been violated.

Not only is the inadequately prepared record a violation of the Rules of Appellate Procedure, and not only does it hamper our ability to locate items in the record, but it absolutely impedes this Court from conducting any meaningful appellate review because there is no official record of which we can take notice. The official record of the case is the fundamental tool for appellate review, and only facts appearing in the official, duly certified record can be considered by the appellate court. *Commonwealth v. Young*, 456 Pa. 102, 317 A.2d 258 (1974); *General Accident Fire and Life Assurance Corp. Ltd. v. Flamini*, 299 Pa. Super. 312, 317, n.3, 445 A.2d 770, 773, n.3 (1982).

With regard to the appeal at 1072 Philadelphia 1986, nothing has been certified. Because the list of docket entries has not been certified and does not include any of the various documents relative to the summary judgment motion upon which the order appealed at 1072 Philadelphia 1986 was made, we have no duly certified, official record of the basis of the motion for summary judgment or the objection thereto. Without any record of the reason summary judgment was sought and the specific objections raised thereto by appellant, we cannot review the order, and the appeal must be dismissed.

Memorandum Opinion

The appeal at 2141 Philadelphia 1985 must be quashed because appellant Neyhard lacks standing to appeal. By virtue of the dismissal of the appeal at 1072 Philadelphia 1986, the trial court's order of April 8, 1986 dismissing Neyhard from the suit continues in effect and therefore Neyhard is no longer a party to the action. Pa.R.A.P. 501 provides that "any *party* who is agrieved ..." may appeal, but an appeal by one who is not a party, must be quashed. *Newberg by Newberg v. Board of Public Education*, 330 Pa. Super. 65, 478 A.2d 1352 (1984). Because Neyhard, the only named representative of the class, is no longer a party to the action, he does not have standing to appeal at 2141 Philadelphia 1985. Therefore, the appeal must be quashed.

Even if appellant did have standing to appeal at 2141 Philadelphia 1985, the appeal would have to be dismissed for the same reasons which we dismiss the appeal at 1072 Philadelphia 1986. There is no duly certified, official record concerning the petition for class certification, and therefore, we are entirely unable to conduct appellate review.

The appeal at 2141 Philadelphia 1985 is quashed. The appeal at 1072 Philadelphia 1986 is dismissed.

Wieand, J., files a DISSENTING MEMORANDUM.

J. 22002/86

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

vs.

STATE FARM INSURANCE COMPANY,

Appellee

No. 2141 Philadelphia, 1985

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

vs.

STATE FARM INSURANCE COMPANY,

Appellee

Dissenting Memorandum Statement

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1072 Philadelphia, 1986

Appeals from Orders of the Court of Common Pleas, Civil Division, of Philadelphia County, No. 608 March Term, 1981.

BEFORE: CIRILLO, P.J., ROWLEY and WIEAND, JJ.

DISSENTING MEMORANDUM BY WIEAND, J.:

I respectfully dissent. In my best judgment, both appeals are properly before us, and the record is sufficient to permit meaningful appellate review of the issues raised. I would consider and decide the appeals on their merits.

Per Curiam Order

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED, Appellant

v.

STATE FARM INSURANCE COMPANY

No. 2141 Philadelphia, 1985

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED, Appellant

v.

STATE FARM INSURANCE COMPANY

No. 1072 Philadelphia, 1986

Appeals from the Orders dated July 26, 1985, and April 8, 1986, in the Court of Common Pleas, Civil Division, of Philadelphia County, No. 608 March Term 1981.

BEFORE: CIRILLO, P.J., ROWLEY and WIEAND, JJ.

PER CURIAM: FILED SEP 25 1986

The appeal at 2141 Philadelphia 1985 is quashed. The appeal at 1072 Philadelphia 1986 is dismissed.

Wieand, J., files a DISSENTING MEMORANDUM.

Per Curiam Order

[J-201 of 1988]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

RICHARD A. NEYHARD, individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Appellant

V.

STATE FARM INSURANCE COMPANY

No. 158 E. D. Appeal Dkt. 1987

Appeal from Order of Superior Court entered September 25, 1986, at Nos. 2141 Philadelphia 1985 and 1072 Philadelphia 1986, Quashing Appeal at No. 2141 and Dismissing Appeal at No. 1072 from Orders of Court of Common Pleas of Philadelphia, Trial Division, Civil Section, entered July 26, 1985, and March 26, 1986, at No. 608 March Term 1981

Pa.Super. , A.2d (1986)

Argued: October 26, 1988

ORDER

PER CURIAM:

Filed: November 14, 1988

Appeal dismissed as having been improvidently granted.

Mr. Justice Larsen dissents.

Per Curiam Order

IN THE SUPREME COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all Members of a Class of Individuals Similarly Situated,

Appellant

v.

STATE FARM INSURANCE COMPANY

No. 158 E.D. Appeal Docket 1987

ORDER

PER CURIAM:

AND NOW, this 25th day of February, 1988, Appellant's Application for Permission to File Supplemental Brief is denied.

J. 22002/86

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of Christopher K. Neyhard, Deceased, and on behalf of all Members of a class of individuals similarly situated,

Appellants

v.

STATE FARM INSURANCE COMPANY

No. 2141 Philadelphia 1985
No. 1072 Philadelphia 1986

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Civil Division, No. 608 March Term, 1981.

BEFORE: CIRILLO, P.J., ROWLEY and WIEAND, JJ.

FILED: June 25, 1986

Per Curiam Order

ORDER

Appellant's Petition for Leave to File Post-Submission Communication filed at No. 2141 Philadelphia 1985 is denied. However, inasmuch as the appeal at No. 1072 Philadelphia 1986 is between the same parties and involves the same basic dispute between the parties as the appeal filed at No. 2141 Philadelphia 1985, and because the decision on the appeal at No. 2141 Philadelphia 1985 may depend on the decision made on the appeal at No. 1072 Philadelphia 1986, we hereby ORDER and DECREE that the appeals at No. 2141 Philadelphia 1985 and No. 1072 Philadelphia 1986 be consolidated for decision by Panel 22 of 1986.

Appellant's brief on issues raised by the appeal at No. 1072 Philadelphia 1986 and not raised in the appeal at No. 2141 Philadelphia 1985 is due on July 6, 1986. Appellee's responsive brief is due 14 days after service of appellant's brief.

Upon the filing of appellee's brief, the Prothonotary is directed to distribute to Panel 22 of 1986 the briefs, reproduced record, and any certified original record filed at No. 1072 Philadelphia 1986.

A decision on the appeal at No. 2141 Philadelphia 1985 is deferred pending receipt of the briefs and the certified record filed at No. 1072 Philadelphia, 1986.

PER CURIAM

s/ James E. Rowley

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

RICHARD A. NEYHARD, Individually and as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Dec'd And on Behalf of All Members of a Class Similarly Situated

vs.

STATE FARM INSURANCE COMPANY

MARCH TERM, 1981
NO. 0608
(CLASS CERTIFICATION)

DECISION
-with-
ORDER

MARUTANI, J.

26 JUL 1985

Factual Background

On February 2, 1978, Christopher K. Neyhard, a minor, died as a result of a collision which occurred in Berks County, Pennsylvania, involving an automobile in which he was a passenger. Plaintiff, Richard A. Neyhard ("Neyhard"), father of decedent and administrator of said decedent's estate, submitted medical and funeral bills to

defendant, State Farm Insurance Company ("State Farm"), which was the insurer for decedent under the Pennsylvania No Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §1009.101, *et seq*. Although said bills were paid by State Farm, it declined to pay the claim for work-loss benefits. At the time of State Farm's denial, there existed a (majority) opinion in *Heffner v. Allstate Insurance Co.*, 265 Pa. Super. 181, 401 A.2d 1160 (1979), holding that work-loss benefits were payable to the survivors of a deceased (adult) victim. This holding was affirmed by the Supreme Court. *Allstate Insurance Co. v. Heffner*, 491 Pa. 447, 421 A.2d 629 (1980). Thereafter, in *Freeze v. Donegal Mutual Insurance Co.*, 301 Pa. Super. 344, 447 A.2d 999 (1982), a seven-judge panel was confronted with the question of whether the estate of an eleven year-old decedent, who had never worked, was entitled to work-loss benefits. With one judge dissenting, the majority held in the affirmative and a majority of the Supreme Court concurred in this result: 504 Pa. 218, 470 A.2d 958 (1983).

In the interim, on March 4, 1981, Neyhard filed his "Complaint in Assumpsit," stating as a "Class Action," under the caption, term and number first set forth hereinabove. Neyhard seeks not only work-loss benefits on his own behalf but also—

> on behalf of all other similary situated legal representatives ... and/or survivors of deceased insureds of defendants who are entitled to work loss benefits pursuant to the No-Fault Act ... which benefits have been wrongfully denied to class members by defendant.[1]

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[1] Plaintiff's "Complaint in Assumpsit," par. 14.

In his prayer for relief, plaintiff, for himself, claims "a sum in the amount of Fifteen Thousand Dollars ($15,000.00)," and on behalf of all class members "all sums due each class member."[2]

During the pendency of this suit,[3] the Court was provided with a list of 998 potential claimants of State Farm. Of this number, 897 were Pennsylvania residents residing in 64 out of 67 Pennsylvania counties, (none in Bedford, Forest and Perry Counties). Of these residents, 423 are represented by an attorney.[4] Of the 64 Pennsylvania counties, 27 have ten or more potential claimants.[5]

In addition to this overall total of 998 potential claimants against State Farm, plaintiff Neyhard, citing to *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 470 A.2d 98

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[2] In short, "monetary recovery alone is sought"; Pa.R.Civ.P. 1708(a).

[3] Previously, this matter had been on the case calendar of another judge.

[4] *See* Appendices "A" and "B" attached hereto.

[5] These 27 counties are the following (the first number is the number of potential claimants, the second the number those represented by counsel)

Allegheny	85-51	Fayette	16-6
Beaver	18-4	Franklin	11-5
Berks	20-15	Lackawanna	12-3
Blair	27-8	Lancaster	23-7
Bradford	12-5	Lawrence	12-2
Bucks	64-30	Lebanon	11-2
Butler	13-4	Lehigh	16-8
Cambria	25-10	Luzerne	25-13
Chester	40-19	Mifflin	13-5
Crawford	12-2	Montgomery	54-29
Dauphin	11-7	Philadelphia	86-65
Delaware	32-16	Washington	23-10
Erie	29-14	Westmoreland	30-11
		York	21-9

(1983), urges this Court to also include in a proposed class certification, claimants—an unknown number—against *other insurers*.[6]

Pursuant to the provisions of the No-Fault Act, State Farm paid medical and funeral expenses to Neyhard, the last payment having been made on May 26, 1978. On May 11 and June 4, 1979, Neyhard's attorney made demand for work-loss benefits. Previously, by letter dated March 31, 1978, Neyhard's attorney had made demand for payment of "all benefits due the estate." State Farm, contending that the two-year limitation period of §106(b)(1) barred entitlement to payment of further benefits, refused to pay such benefits.[7] On March 4, 1981, plaintiff instituted the present action styled as "Class Action."

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[6] For example, in his proposed "Findings of Fact," Neyhard suggests the following:

> 15. Defendant has also filed a Motion for Summary Judgment as to Plaintiff's individual claim, based on the contention that this action was not timely because more than two years elapsed after the last payment of benefits before suit was filed.
>
> 16. Plaintiffs' Answer to the Motion for Summary Judgment contends that the statute of limitations was tolled during the pendency of another class action, *Nye v. Erie Insurance Exchange* [504 Pa. 3, 470 A.2d 98 (1983)].
>
> 17. The issue whether the statute of limitations was tolled by the *Nye* class action filing is also applicable to 117 potential class members' claims, based on information supplied by State Farm.

In his accompanying legal memorandum, at page 14, Neyhard expounds on this point that plaintiff "fall[s] into a group whose claims were included in the class definitions in the class action complaints filed in *Nye* [and] *Wilson* [v. State Farm, C.P. Dauphin (1978)], or both."

[7] State Farm filed a "Motion for Summary Judgment" asserting that Neyhard's claim is time-barred.

Discussion

The burden of meeting the prerequisites for class certification is on the proponent. *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12 (1976); *Janick v. Prudential Ins. Co. of America*, 305 Pa.Super. 120, 451 A.2d 451 (1982). There is no negative burden on the party opposing certification. *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743 (N.D. Ohio 1975).[8] The proponent must establish each prerequisite, and if any is deficient, the class may not be certified. *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976). Conclusory allegations will not suffice; the court must be provided with factual bases. *Id.* at 978.

We turn to consideration of rules governing class actions, focusing in particularly on Pa.R.Civ.P. 1702 and 1708(a).

1. *Numerosity of Class and Adequacy of Representation*

Under the evidence, it cannot be gainsaid that the proposed class is "so numerous that joinder of all members is impracticable": Rule 1702(1).

Adequacy of plaintiff's counsel in class-action proceedings is not contested and there is no reason for the Court to question counsel's adequacy, which is to be assumed unless the contrary is demonstrated. *Janick v. Prudential Insurance Co. of America*, 305 Pa.Super. 120, 451 A.2d 451 (1982). Further, absence of conflict of interest is also assumed unless the contrary is demonstrated. *Id.* There appears to be no basis to conclude the existence of any con-

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[8] State rules may be interpreted by reference to cases decided under similarly-worded federal class action rules. *McMonagle v. Allstate Insurance Co.*, 460 Pa. 159, 331 A.2d 467 (1975).

flict of interest in the present proceeding. Plaintiff's counsel has previously appeared before this Court in a class-action matter, and the Court is well acquainted with counsel's competence.

In his proposed findings, plaintiff refers to his financial capabilities, including a representation that his counsel "have and will advance the costs of this litigation, subject to reimbursement by plaintiff and/or all class plaintiffs."[9] Although on this record, we are not fully persuaded[10] that plaintiff has sastisfied the requirement of "hav[ing] or acquir[ing] adequate financial resources," Pa.R.Civ.P. 1709(3), we are not prepared, at this stage, to reject certification on this basis. In the proposed finding submitted by plaintiff's counsel, it is represented that counsel will advance the costs. Although plaintiff's counsel would suggest that there are a number of factual and legal issues to be resolved,[11] inasmuch as the legal questions relating to work-loss benefits of decedents have been placed to rest, essentially what remains is the *processing* of individual claims.

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[9] Plaintiff's proposed "Findings of Fact," pars. 9 and 10. Par. 9 reads: "Plaintiff and his wife own their own home free of any mortgage, and have substantial investments. He is steadily employed and earns $30,000 per year." There is no evidence of record to support this assertion; nor is there evidence that plaintiff's spouse is prepared to place her proprietary interests into financing this class action. In par. 18(c) of his complaint, plaintiff avers that "Named plaintiff has adequate financial resources to assure that the interests of the class will not be harmed." There is no evidence in support of this assertion.

[10] *See* footnote 9, *supra*.

[11] These are contained in plaintiff's proposed findings (the numbers referring to the paragraphs of such proposed findings):

> 17. [W]hether the statute of limitations was tolled by the *Nye* class action filing. ...
>
> 24. [W]hen interest begins to accrue. ...

2. *Fairness and Efficiency of Class Action*

In determining whether class action provides a fair and efficient method of resolving questions common to the proposed class, we are guided by the criteria set forth in Pa.R.Civ.P. 1708. Among such criteria, where, as here, "monetary recovery alone is sought," are:

> (4) the extent and nature of any lititation already commenced by or against members of the class involving any of the same issues;
>
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
>
> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expenses and effort of administering the action as not to justify a class action.

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25. [W]hether the ... estates of retired decedents are entitled to work loss based on pension or Social Security benefits. ...

28. [W]hether State Farm ... had a reasonable foundation to deny post-mortem work loss benefits. ...

29. [W]hether State Farm has waived the statute of limitations ... by failing to plead it in New Matter. ...

30. [W]hether State Farm is estopped from raising the statute of limitations ... where it has not conceded timeliness, for failure to send a denial notice. ...

31. The computation of benefits raises a common factual question of the method of computation ... based on one of three ... statutory formulae. ...

Pa.R.Civ.P. 1708(a).

Aside from the key legal principle having been settled in *Freeze v. Donegal Mutual Insurance Co., supra,* we are here concerned with a self-contained statute, the No-Fault Act, which, among other things, specifies the nature of benefits available, the imposition of interest on overdue payments, the basis upon which claims may be made, and the right of an obligor to claim an offset.[12] The statute also sets forth safeguards for the disposition of claims, including a requirement that settlements above $2,500 be supported by a "finding, by a court of competent jurisdiction, that the settlement is in the best interest of the claimant and any beneficiaries ... and that the claimant understands and consents to such settlement;" further, the court may fix "reasonable attorney's fee[s]."[13]

Whether an already overburdened court system in this metropolitan area,[14] should presume to arrogate to it-

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[12] No-Fault Act, §106(a)(1)-(5).

[13] *Id.* §106(b)(1).

[14] The First Judicial District of Pennsylvania (Philadelphia) reports as the close of 1983 the following:

Civil cases pending 24,267
(An increase of 12,131 from the beginning of the year)

Arbitration cases pending 18,940

Criminal cases pending. 7,563
(An increase of 1,330 cases from the beginning of the year)

Family Court Division 9,270
(An increase of 2,305 cases from the beginning of the year)

Orphans' Court 85
(This Court having disposed of some 5,232 matters during 1983)

In the civil trial division alone, there were no less than 85,464 new cases filed during 1983. (The rate in 1984 has been far higher).

Source: "Philadelphia Court of Common Pleas, 1983 Annual Report," pp. 29-30.

self the processing of some 811 additional cases,[15] that otherwise would be resolved in the other judicial districts throughout this Commonwealth, challenges not only logic but the structure of the No-Fault Act itself.

There is nothing to be gained for claimants and their counsel (where individual counsel represent claimants) to leave their home jurisdictions and be required to converge upon Philadelphia. In many instances, hearings may be required to determine the extent of benefits;[16] if a settling claimant desires a hearing or seeks clarification of some issues, he would be compelled to incur the time and expense of distant travel rather than gain satisfaction in his local jurisdiction,; witnesses, documentations, etc. would similarly be subjected to the same inconveniences. Finally, in determining "reasonable attorney's fees," where applicable, we would be confronted with applying "Philadelphia" standards (such as they may be) to counsel from 63 other counties; further, such counsel fees may well be needlessly inflated by reason of time dissipated by distances.

Each of the local courts in the other jurisdictions are open and readily available to process claims.[17] Nothing is to be gained by siphoning some 811 "outside" claims to Philadelphia. On the contrary, such would only serve to unduly burden an already overloaded judicial system—risking delays not only in processing additional

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[15] Of the 897 potential claimants in Pennsylvania, 86 are in Philadelphia.

[16] *Fox v. State Farm Mutual*, 322 Pa.Super. 96, 469 A.2d 199 (1983) (survivor must plead and prove loss).

[17] We are not transferring any action from this jurisdiction to another county: Pa.R.Civ.P. 1006(d). However, even if we were deemed to be doing so, there exists discretionary basis for such action: *Ernest v. Fox Pool Corp.*, Pa.Super. , 491 A.2d 154 (1985).

no-fault claims but also in displacing the many cases already awaiting disposition in Philadelphia. As to the 86 claimants in Philadelphia, their claims are, of course, to be disposed of in this district.

Entitlement, as a matter of law, is a settled issue. Each claim has a potential of up to $15,000, plus interest at 18% per annum, and possibly attorney's fees. Such claims are routinely disposed of on an individual basis. Where there exist factual disputes peculiar to an individual claim, the mere fact that such a case is incorporated into a class-action proceeding would not facilitate the disposition of such case. On the contrary, becoming enmeshed into a multiple-claimant proceeding may impede disposition of a case involving factual disputes.

3. *The Statute of Limitations Question*

Neyhard, somewhat expansively, urges this Court to encompass within a proposed class, those individuals seeking work-loss benefits from insurance companies *other than* the defendant insurer (State Farm) before this court. We reject this suggestion out of hand. Such proposed claimants have not "been aggrieved by the conduct of" State Farm. *Nye v. Erie Insurance Exchange*, 504 Pa. at 6, 470 A.2d at 100. These unidentified, unknown, insurance carriers, who are to be unilaterally and unsuspecting swept into this proceeding, are entitled to due process.

Conclusions of Law

1. The purported class is sufficiently numerous that joinder of all interested members is impractical.

2. The claim of the named plaintiff—insofar as the legal issue of entitlement is concerned—is typical of the absent class members.

3. However, the question of entitlement having been resolved in *Freeze v. Donegal Mutual Insurance Co., supra,* the matters remaining for resolution are individual questions of fact. Such resolutions are appropriately and better attained in the local forums of the various claimants. Such is consistent with the provisions of the No-Fault Act and would avoid imposing needless inconvenience and costs upon claimants and counsel (where individual counsel represent claimants) who have available to them their respective local forums.

4. There exists no compelling reason why a metropolitan district, such as Philadelphia, already overburdened with its own caseload, should undertake to divert cases from coordinate districts.

5. Except for class members residing in Philadelphia, a class action does not provide a fair and efficient method of adjudicating the controversy within this district. Moreover, the central "controversy" common to the class, having been resolved, no longer exists.

6. The representative party does not have a conflict of interest in the maintenance of a class action and will fairly and adequately represent and protect the interests of the class.

WHEREFORE, there is entered the following—

Order

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

RICHARD A. NEYHARD, Individually and as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Dec'd And on Behalf of All Members of a Class Similary Situated

vs.

STATE FARM INSURANCE COMPANY

MARCH TERM, 1981

NO. 0608

(Class Certification)

ORDER

AND NOW, 26 JUL 1985, upon consideration of (a) "Plaintiff's Motion for Class Certification," as amended, (b) "Answer of Defendant State Farm Mutual Automobile Insurance Company," and, (d) hearing held thereon, it is HEREBY ADJUDGED ORDERED AND DECREED that plaintiff's motion for class certification is:

(A) *granted* as to: (1) administrators or executors of estates of decedents whose death arose out of the "maintenance or use of a motor vehicle" as defined by the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.103; (2) deaths which occurred on or after July

19, 1975 (the effective date of the No-Fault Act) and claims arising therefrom was not otherwise barred as of March 4, 1981 (the date the instant class-action proceeding was commenced); (3) such decedents then being insured under a policy of insurance issued by defendant, State Farm Insurance Company, or whose claim was assigned to said defendant under the "assigned claims plan" under the No-Fault Act; (4) such defendant having neither paid post-mortem work-loss benefits in the amount of available policy limits, together with 18% per annum interest accruing thirty (30) days after said defendant's receipt of the insured's death, nor had entered into a court-approved settlement of a post-mortem work-loss benefit claim; (5) claims where any one or more of following apply—(a) the accident occurred in Philadelphia County; (b) at the time of death, decedent's residence was in Philadelphia County; (c) the administrator or executor resides in Philadelphia County; or (d) the Register of Wills of Philadelphia County had granted letters to an administrator or executor; (e) an action seeking decedent's work-loss benefits has been instituted in Philadelphia County as of the date of this order; and (6) no action is pending for work-loss benefits which had been instituted outside of Philadelphia County.

(B) *denied* as to all other claims or claimants, "other claimants") with the proviso, however, that from and after March 4, 1981, and until written notice—to be prepared by the parties and submitted to this Court for approval within thirty (30) days from the date of this Order—is provided to each of the other claimants, whatever claims they may have are to be preserved, without prejudice, upon terms and conditions to be set forth in such notice.

BY THE COURT:
s/ MARUTANI, J.

List 1

LIST # 1

Adams	5	Lackawanna	12
Allegheny	85	Lancaster	23
Armstrong	5	Lawrence	12
Beaver	18	Lebanon	11
Bedford		Lehigh	16
Berks	20	Luzerne	25
Blair	27	Lycoming	9
Bradford	12	McKean	6
Bucks	64	Mercer	5
Butler	13	Mifflin	13
Cambria	25	Monroe	4
Cameron	2	Montgomery	54
Carbon	2	Montour	4
Centre	7	Northampton	7
Chester	40	Northumberland	9
Clarion	1	Perry	
Clearfield	6	Philadelphia	86
Clinton	4	Pike	1
Columbia	9	Potter	3
Crawford	12	Schuylkill	7
Cumberland	8	Snyder	5
Dauphin	11	Somerset	7
Delaware	32	Sullivan	1
Elk	4	Susquehanna	2
Erie	29	Tioga	3
Fayette	16	Union	1
Forest		Venango	2
Franklin	11	Warren	5
Fulton	2	Washington	23
Greene	7	Wayne	4

List 1

Huntingdon	7	Westmoreland	30
Indiana	5	Wyoming	2
Jefferson	1	York	21
Juniata	4		
Out of State:	11		

List 2

LIST # 2

Adams	1	Lackawanna	3
Allegheny	51	Lancaster	7
Armstrong	1	Lawrence	2
Beaver	4	Lebanon	2
Bedford		Lehigh	8
Berks	15	Luzerne	13
Blair	8	Lycoming	7
Bradford	5	McKean	3
Bucks	30	Mercer	2
Butler	4	Mifflin	5
Cambria	10	Monroe	1
Cameron	2	Montgomery	29
Carbon		Montour	
Centre	1	Northampton	2
Chester	19	Northumberland	2
Clarion	1	Perry	
Clearfield	1	Philadelphia	65
Clinton	1	Pike	1
Columbia	2	Potter	1
Crawford	2	Schuylkill	4
Cumberland	4	Snyder	2
Dauphin	7	Somerset	1
Delaware	16	Sullivan	1
Elk	4	Susquehanna	2
Erie	14	Tioga	1
Fayette	6	Union	
Forest		Venango	1
Franklin	5	Warren	2
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Indiana	1	Wyoming	
Jefferson		York	9
Juniata	3		

Memorandum Opinion with Order

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and On Behalf of All Members of a Class of Individuals Similarly Situated

vs.

STATE FARM INSURANCE CO.

March Term, 1984
No. 0608
(Class Action)

MEMORANDUM OPINION
-with-
ORDER

Marutani, J.

26 MAR 1986

Before this Court is a class-action proceeding seeking work-loss benefits under the provisions of the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §1009.101, et seq; (repealed October 1985). For present purposes, the claims involve some 86 Philadelphia claimants,[1] seeking work-loss

[1] There are also some 811 non-Philadelphia claimants as to whom this Court declined to certify a class for processing and adjudicating their respective claims in this Court. Such ruling was appealed to the Superior Court where the question is pending.

benefits under the authority of *Freeze v. Donegal Mutual Insurance Co.*, 301 Pa.Super. 344, 447 A.2d 999 (1980), affirmed 504 Pa. 218, 470 A.2d 958 (1983). The background facts have been set forth in this Court's Decision of July 26, 1985. We shall not repeat them here.

The principal issue is whether the time limitations set forth in section 106(c) of the No-Fault Act were tolled by reason of another class-action proceeding in which the defendant, State Farm Mutual Insurance Co. ("State Farm"), was among 30 defendants which were dismissed because in that prior proceeding the plaintiff lacked standing as to those 30 defendants. Another question is whether the Philadelphia class members,[2] of whom some three-quarters (65 out of the 86) are represented by their own attorneys, should have the choice of "opting in" or "opting out" of the class.

Discussion

1. *The Statute of Limitations Question*

Plaintiff Neyhard contends that the class-action proceeding of *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 470 A.2d 98 (1983), in which State Farm was initially one of 30 additional insurance carriers named as a party defendant, operated to toll the statute of limitations. The class-action proceeding in that case was instituted on November 5, 1979. On February 4, 1981, on the basis that plaintiff Nye lacked standing to sue these 30 insurance carriers with whom Nye had had no transactions, the trial court dismissed Nye's complaint. On appeal to the Supreme

---

[2] In the instant proceeding before this Court, our Order accompanying the Decision of July 26, 1985, certified as Philadelphia class members, only as to "claims ... not otherwise barred as of March 4, 1981 (the date the instant class-action proceeding was commenced); ...."

Court,[3] the action of the trial court was upheld: *Nye v. Erie Insurance Exchange,* supra.

> The requirement that a party must be "aggrieved" as a prerequisite to maintaining an action in this Commonwealth is applicable to class actions.
> * * *
> In the present case, Nye's complaint fails to allege that he has been aggrieved by the conduct of any of the defendant insurance companies except Erie. Consequently, appellee [Nye] lacks standing to maintain an action against these [30] defendants.

503 Pa. at 6, 470 A.2d at 100 (citation omitted).

In support of his contention that the *Nye* case tolled the statute of limitations in his class-action proceeding, Neyhard points to a footnote in *Alessandro v. State Farm Mutual Auto Insurance Co.,* 487 Pa. 274, 279, n. 9, 409 A.2d 347, 350, n. 9 (1979), reading (including the body of the opinion which leads to the footnote):

> If one of the joined parties is dismissed from the action, the litigation is at an end for that litigant. Failure to appeal timely from the dismissal results in a waiver of that claim.[9]
>
> 9. See *Love v. Temple University,* 422 Pa. 30, 220 A.2d 838 (1966). See generally, 7 Goodrich-Amram §2230(a) 3.6, n. 75 (1977). Unlike a case where parties are joined, all members of a class are

---

[3] There was an intervening appeal to the Superior Court: *Nye v. Erie Insurance Exchange,* 307 Pa.Super. 464, 453 A.2d 677 (1982), in which the Superior Court had reversed the dismissal by the trial court of these 30 insurance carriers. The most recent appellate consideration of this same case appears at Pa.Super. , 503 A.2d 954 (1986).

> "parties plaintiff" upon the filing of the complaint. When the defendant successfully moves for *decertification, the decertified parties* are "put out of court" as to the class action. This order is final, *Lee v. Child Care Services*, 461 Pa. 741, 337 A.2d 586 (1975), and the decertified class members may then pursue their actions on an individual basis. They will not be time barred by the statute of limitations, as it is suspended during the time they are allegedly parties to the class action. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). [Emphasis added.]

A superficial perusal of the foregoing has an enticing appeal which might lead one to adopt the conclusion that plaintiff Neyhard propounds. However, reflective analysis exposes plaintiff Neyhard's premises, and thereupon his reasoning, to be seriously flawed.

First, in the *Nye* proceeding, *there was no decertification of any plaintiffs;* the holding in *Nye* was that as to the 30 non-transactional insurance carriers, the plaintiffs lacked *standing to sue*. If there was any "decertification," it was as to the 30 non-transactional, *defendant insurance carriers* who were dismissed from the case.

Next, we consider the dicta in footnote 9 from the *Alessandro* case. As we read the meaning set forth therein: where a defendant "successfully moves for decertification, the * * * decertified class members may then pursue their actions on an individual basis." 487 Pa. at 279, n. 9, 409 A.2d at 350, n. 9. Applied in the context of the *Nye* proceeding, if any of the alleged class members therein had been decertified, and nonetheless had a transactional claim against the surviving insurance carrier, i.e. Erie Insurance

Exchange, each such class member may thereafter "pursue their actions on an individual basis" without being "time barred by the statute of limitation, as it is suspended during the time they are allegedly parties to the class action." *Id.*

If the proposition that plaintiff Neyhard advances were to be adopted, an unsettling uncertainty would be injected into the statute of limitations provisions of the No-Fault Act: any party, even lacking standing to sue, could initiate a class-action suit naming in a wholesale manner, defendants who were not in any manner involved in any transaction in that proceeding, thereby "tolling" a statutory provision until such improperly named defendants are ultimately discharged from the case.

Further, the holding in *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 38 L.Ed.2d 731 (1974), fails to support the proposition being advanced by Neyhard. The tolling of the statute of limitations there was under an express provision of the Clayton Act, 15 U.S. §16(b), 15 U.S.C.S. §16(b).[4] The Supreme Court held:

> Thus, the commencement of the action satisfied the purpose of the limitation provision *as to all those who might subsequently participate in the suit* as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because

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[4] The applicable federal statute reads:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, ... the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter. ...

> then the sole means by which members of the class could assure their participation in the judgment if notice of the class did not reach them until after running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).

414 U.S. at 551, 38 L.Ed.2d at 725 (emphasis added). Under the above-recited principle, if plaintiff Neyhard had a transactional relationship with the surviving defendant in *Nye v. Erie Insurance Exchange*, the pendency of that proceeding would have tolled the statute of limitations to his benefit. However, such is not the situation presented before us.

We, therefore, are compelled to the conclusion that as to the work-loss claims being asserted against defendant, State Farm Mutual Insurance Co., in the instant proceedings, the statute of limitations was not tolled by the Nye proceedings.[5]

---

[5] In his "Memorandum of Law," plaintiff Neyhard poses other questions such as State Farm's alleged failure to give notice to Neyhard of his rights ("The Notice Requirement of Section 106(a)(5) [of the No-Fault Act] Is Linked to the Statute of Limitations In Section 106(c)") as well as challenging the constitutionality of the act; ("The No-Fault Act Violates The Due Process Clause of the Fourteenth Amendment Unless It is Interpreted As Providing That Violations of Section 106(a)(5) Toll the Statute of Limitations.") We are unpersuaded by contentions that somehow a potential defendant is under a legal duty to notify a potential plaintiff to institute proceedings, and upon "failure" to do so, the statute of limitations is tolled. As to the constitutional question, we are guided by the Statutory Construction Act, of Dec. 6, 1972, 1 Pa. C.S.A. §1922.

2. *Class Members' Election*

Neyhard's counsel urges that the (Philadelphia) class members should be included unless a member files of record a written election to be excluded from the class; plaintiff's counsel then refers to the provisions of Pa.R.Civ.P. 1711.[6]

As noted hereinbefore, of the 86 Philadelphia potential class members, some three-quarters, or 65 members, are represented by their individual attorneys. Thus, at least as to such represented potential class members, they have demonstrated through their retention of attorneys, to "have sufficient resources, experience and sophistication ... to conduct their own litigation." Pa.R.Civ.P. 1711 (b)(1).

We find no reason to require them to have to elect to exclude themselves from the class.

As to the remaining Philadelphia potential class members, we shall direct that such members are "included unless ... a member files of record a written intention to be excluded from the class." Pa.R.Civ.P. 1711(a).

3. *Named Plaintiff Mr. Neyhard*

Mr. Neyhard filed his complaint in this matter on March 4, 1981. The decedent's death was on February 2, 1978, three years and one month before the complaint was filed. The last no-fault benefit payment to plaintiff Neyhard occurred on May 26, 1978. Section 106(c)(1) of the No-Fault Act provides:

(c) time limitations on actions to recover benefits.

---

[6] Plaintiff's "Memorandum of Law," p. 25.

> (1) if no-fault benefits have not been paid for loss arising otherwise other than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two years after the last payment of benefits.

Under this provision, plaintiff Neyhard had until May 27, 1980 to initiate an action for post-mortem work-loss benefits. Plaintiff Neyhard's complaint on behalf of himself was not filed in a timely fashion.

WHEREFORE, there is entered the following—

Order

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on Behalf of All Members Of a Class of Individuals Similarly Situated

vs.

STATE FARM INSURANCE CO.

March Term, 1981

No. 0608

(Class Action)

ORDER

AND NOW, 26 MAR 1986, upon consideration of (a) Defendant's "Motion for Summary Judgment," (b) "Named Plaintiff's Answer to Motion for Summary Judgment of Defendant State Farm Insurance Company and Cross-Motion for Partial Summary Judgment," (c) Defendant's "Reply to Plaintiff's Answer and Cross-Motion for Summary Judgment, (d) Plaintiff's "Memorandum of Law in Response to Defendant's Reply to Answer and New Matter," (e) Defendant's "Memorandum ... *Contra* Plaintiff's Response to Defendant's Reply to Plaintiff's Answer and Cross-Motion to Defendant's Motion for Summary Judgment," (f) "Memorandum of Law of Defendant, State Farm Insur-

ance Company on issues Raised by the Court Concerning Class Members," (g) "Plaintiff's Memorandum of Law Concerning Class Definition Questions," (h) "Plaintiff's Reply Memorandum Re Class Certification Questions, and (i) "Reply to Plaintiff's Memorandum of Law Concerning Class Definition Questions," it is HEREBY ADJUDGED, ORDERED AND DECREED that plaintiff Richard A. Neyhard's claim is *dismissed*, pursuant to the provisions of section 106(c)(1) of the No-Fault Act, as having been untimely instituted.

Counsel shall, within thirty (30) days from date hereof, submit to this Court for its consideration, a suggested form of Order to implement the foregoing.*

BY THE COURT:
s/ Marutani, J.

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* Informally, there had been a suggestion that if plaintiff Neyhard's claim were to be dismissed, plaintiff's counsel would add, or otherwise substitute, a plaintiff who would not be burdened with the legal infirmity of the bar of the statute of limitations. Therefore, until that is accomplished, and defendant State Farm is provided with an opportunity to address such step, it is both premature and inappropriate to consider further measures relating to potential class members.

J. 22002/86

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHIRSTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

v.

STATE FARM INSURANCE COMPANY

No. 2141 Philadelphia, 1985

RICHARD A. NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF INDIVIDUALS SIMILARLY SITUATED,

Appellant

v.

STATE FARM INSURANCE COMPANY

No. 1072 Philadelphia, 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeals from the ORDERS of the Court of Common Pleas of PHILA-

DELPHIA County be, and is QUASHED AT NO. 2141PHL85. APPEAL AT NO. 1072PHL86 IS DISMISSED.

BY THE COURT:
s/ J. Haniel Henry
PROTHONOTARY
Dated September 15, 1986

Order of Court

J. 22002/86

IN THE SUPERIOR COURT OF PENNSYLVANIA

RICHARD A NEYHARD, INDIVIDUALLY AND/OR AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER K. NEYHARD, DECEASED, AND ON BEHALF OF ALL MEMBERS OF A CLASS OF-INDIVIDUALS SIMILARLY SITUATED,

Appellants

v.

STATE FARM INSURANCE COMPANY

Nos. 2141 Philadelphia, 1985, and 1072 Philadelphia, 1986

ORDER OF COURT

AND NOW, this 10th day of November, 1986, Appellants' Application for Reargument is denied.

s/ Per Curiam

Publisher's Note: Reset from original including errata.

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1363

In The

Supreme Court of the United States

October Term, 1988

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner,

vs.

STATE FARM INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a State appellate court's order dismissing an appeal because of the absence of a proper, certified record violated any constitutional rights of the appellant where the appellant had the ability and duty under state law to take steps to ensure that a proper, certified record was made available to the appellate court in order to allow it to consider his appeal?

2. Whether a State appellate court's order dismissing an appeal because of the absence of a proper, certified record violated any constitutional rights of the appellate, even assuming, *arguendo,* that that order resulted solely from the negligent failure of the clerk of the lower court to prepare and certify a proper record, when state law provides a tort remedy for the negligent acts of judicial officials such as the clerk of courts?

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COUNTERSTATEMENT OF THE CASE

Petitioner Richard A. Neyhard ("Neyhard") seeks review of an order of the Superior Court of Pennsylvania dismissing his appeal because of the absence of a proper, certified record upon which that appeal could be decided. After the entry of that order, petitioner unsuccessfully sought reargument before the Superior Court. Thereafter, he sought discretionary review of that order before the Supreme Court of Pennsylvania. After initially granting allocatur, and hearing argument on the merits of the appeal, the Pennsylvania Supreme Court dismissed the appeal as having been improvidently granted. (10a).

The underlying action was a class action in which petitioner sought to represent the executors and administrators of estates of persons insured by respondent State Farm Mutual Automobile Insurance Company ("State Farm") who were allegedly entitled to certain benefits under the now-repealed Pennsylvania No-fault Motor Vehicle Insurance Act, 40 P.S. § 1009.101 *et seq.* (repealed 1984). The trial court denied petitioner's request that it certify a state-wide class, instead certifying a class consisting only of those potential claimants who had some "minimum contacts" with Philadelphia County.[1] Subsequently, the trial court granted summary judgment in

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[1] The excluded putative class members then filed a second class action lawsuit in federal court. *Kromnick v. State Farm Mutual Automobile Insurance Company,* No. 85-5824 (E.D. Pa.). (24a). The federal district court has since certified a statewide plaintiff class, excluding only those Philadelphia-related plaintiffs who have been certified as a class in the *Neyhard* case.

favor of State Farm on the ground that petitioner's own claim was barred by the applicable statute of limitations.[2]

Neyhard appealed the entry of summary judgment to the Superior Court of Pennsylvania. On September 25, 1986, the Superior Court entered a *per curiam* order dismissing Neyhard's appeal. (9a).[3] In its accompanying memorandum, the panel majority explained:

> With regard to [this] appeal . . . *nothing has been certified*. Because the list of docket entries has not been certified and does not include any of the various documents relative to the summary judgment motion upon which the order appealed . . . was made, we have no duly certified record of the basis of the motion for summary judgment or the objection thereto. *Without any record* of the reason summary judgment was sought and the specific objections raised thereto by appellant, *we cannot review the order*, and the appeal must be dismissed.

---

[2] Neyhard had admitted that he failed to file suit within the applicable two-year statute of limitations period, but contended that the statutory period had been tolled by the filing of an earlier class action. The Pennsylvania Supreme Court has since rejected this same contention in another case. *Cunningham v. INA*, 515 Pa. 486, 530 A.2d 407 (1987), *cert. den.*, 56 U.S.L.W. 3460 (Jan. 11, 1988).

[3] Neyhard also appealed the class certification order. That appeal was quashed on the grounds that, because of the order dismissing his claim, he had no standing to pursue appellate review of the issues raised in that appeal and that there was no other appellant before the appellate court who did have such standing. Neyhard did not seek review of the decision regarding his lack of standing in the Pennsylvania Supreme Court. It is, therefore, not before this Court.

(5a) (emphasis added). The court also noted that the absence of a properly certified record "absolutely impedes this Court from conducting any meaningful appellate review because there is no official record of which we can take notice." (5a).

Thereafter, as noted, Neyhard filed an Application for Reargument, or, in the Alternative, Petition for Reconsideration of the Superior Court's Order. That Application did not raise any constitutional challenges to the Superior Court's decision, but rather claimed only that the Court had abused its discretion in dismissing Neyhard's appeal. The Superior Court denied Neyhard's Application. (42a). His subsequent appeal to the Pennsylvania Supreme Court was also dismissed as having been improvidently granted. (10a).

REASONS FOR DENYING THE WRIT

Petitioner has failed to state a Federal claim requiring review by this Court

1. Petitioner claims that a variety of constitutional violations occurred when the Superior Court of Pennsylvania dismissed his appeal on the procedural ground that no properly certified, official record had been received by that Court. Each of petitioner's claims is based on the premise that he was the innocent and powerless victim of the trial court's negligence in failing to transmit a proper record to the appellate court. Based on that premise, Neyhard claims that dismissal of his appeal was arbitrary and capricious and, therefore, in violation of the Due Process and Equal Protection clauses of the Constitution.

That premise is, however, wholly incorrect. To the contrary, pertitioner, as appellant before a Pennsylvania appellate court, had both the ability and the duty to ensure that that court had a proper record before it when deciding his appeal. Thus, petitioner was neither innocent nor powerless and the appellate court acted well within constitutional bounds in dismissing his appeal.

Specifically, Rule 1926 of the Pennsylvania Rules of Appellate Procedure explicitly provides for correction of the record, either before or after its transmission to the appellate court, by stipulation of the parties or order of either the lower or appellate court.

According to the preeminent commentator on Pennsylvania appellate practice:

> Pa.R.A.P. 1926 provides an appellant with the opportunity to eliminate potentially troublesome impediments to appellate review by making necessary corrections or modifications to the record on appeal once the record is lodged with the appellate court. In order to take advantage of this opportunity, however, counsel for appellant must actually review the record that is transmitted from the trial court to the appellate court. The record may be reviewed before it is transmitted from the trial court to the appellate court. The record may be reviewed at the appellate court after it is transmitted. . . . Only through such a review can counsel for appellant be sure that the appellate court is in possession of the entire record on appeal. Where it is determined that, through ministerial error, the prothonotary of the lower court has omitted to send portions of the original record to the appellate court, counsel can stipulate to supplement the original record with the omitted material, and praecipe the prothonotary of the trial court to prepare and transmit a supplemental original record to the appellate court.

1 Pennsylvania Appellate Practice § 1926:7 at 517. This same commentator also suggests that:

> [c]ounsel for the parties should monitor the compilation and transmission of the original record from the lower court to the appellate court as a matter of course. By so doing, counsel will be able to insure that all of the components of the original record are actually transmitted to the appellate court.

1 Pennsylvania Appellate Practice § 1935:4 at 533. Thus, the petitioner, through his counsel, clearly had the ability to seek the additions or corrections to the record which would have allowed the Superior Court properly to consider and decide his appeal. If he had done so, he would presumably have discovered and corrected the deficienices which resulted in dismissal of his appeal.[4]

In this critical respect, he is different from the petitioner in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), who had *no* power to take the action necessary to avoid dismissal of his claims – the holding of a conference. *Id.* at 444. Petitioner here had a mechanism readily available by which to assure that an adequate and accurate record was submitted to the Superior Court. He simply failed to utilize that mechanism, mistakenly relying on others to protect his rights and carry out his

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[4] Petitioner denies he had the power to correct the record, but does not claim he attempted to do so. Clearly, Rule 1926 provides a mechanism for doing so. There is no basis to conclude that, if he had tried, petitioner would have been unable to utilize that rule to ensure that the appellate court had a proper, certified record before it in deciding his appeal. Indeed, any presumption should be to the contrary.

duties. Thus, this is not a case where an innocent[5] or powerless litigant is being deprived of his opportunity to litigate because of circumstances beyond his control.

Petitioner also had the duty, as well as the power, to ensure that the appellate court had an adequate and proper record before it. It was his appeal and he, therefore, had an obligation to take all steps within his power to ensure that the case was ready for appellate review. Those steps include ensuring that the appellate court is provided with a proper record. *See, e.g., Commonwealth v. Walsh*, 252 Pa. Super. 111, 114, 380 A.2d 1307, 1308 (1977) ("The responsibility for insuring that the record accurately reflects the proceedings before the lower court rests with the lower court *and the parties*" (emphasis added)); 1 Pennsylvania Appellate Practice § 1926:2 at 514 ("The obvious objective in providing a mechanism for the correction and modification of the record on appeal is to present the appellate court with a complete record at the time the appellate court addresses the merits of the issues on appeal. *This is the joint responsibility of the parties*

---

[5] Indeed, petitioner is represented by able, experienced counsel who has brought a number of cases similar to this one against State Farm and other insurance carriers. *See, e.g., Kromnick v. State Farm*, C.A. No. 85-5824 (E.D. Pa.); *Hardy v. Nationwide Ins. Co.*, No. 5863 August Term 1982 (C.P. Phila.); *King v. Liberty Mutual Ins. Co.*, No. 340 December Term 1980 (C.P. Phila.). In fact, plaintiff himself has been a party to appellate proceedings in other similar cases. *Wilson v. State Farm Mutual Insurance Company*, 512 Pa. 486, 517 A.2d 944 (1986). Thus, his suggestion that he is a naive victim of Pennsylvania's judicial system is disingenuous at best.

and the lower court" (emphasis added)); *See also Mountaintop Area Joint Sanitary Authority v. Malone*, 73 Pa. Commw. 217, 457 A.2d 1033 (1983). Petitioner simply failed to carry out that duty.

At the time that petitioner's appeal was dismissed by the Superior Court, Pennsylvania's Rules of Appellate Procedure mirrored the Federal Rules in providing that:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

Pa.R.A.P. 902 (amended 1987). *Compare* Fed. R.A.P. 3(a). Certainly, that rule authorized dismissal of an appeal where, as here, an appellant failed to carry out his responsibility to ensure that the appellate court had before it a proper, certified record upon which to decide his appeal.[6]

There can be no serious question that appellate courts have the power to promulgate rules governing practice before them. There can also be no serious question that they have the power to enforce them. *Brooks v. Fitch*, 642 F.2d 46, 48 (3d Cir. 1981); *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404 (3d Cir. 1980). The Pennsylvania rules involved in this case were rationally related to

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[6] The Rules have since been amended to replace the reference to dismissal of the appeal with the following: "such action as the appellate court deems appropriate, which may include, but is not limited to, remand of the matter to the lower court so that the omitted procedural step can be taken." Pa. R.A.P. 902, as amended January 31, 1987. While that rule apparently encourages remand, it would still appear to permit dismissal.

ensuring that the Pennsylvania appellate courts have a proper, certified record upon which to decide appeals. Petitioner failed to satisfy his duties as a party before Pennsylvania's appellate courts to ensure the creation and presence of such a record. He was harshly, but properly, sanctioned for that failure. The imposition of that sanction was neither arbitrary nor capricious and, therefore, violated no constitutional rights.

2. Even if one accepts petitioner's erroneous premise that his appeal was dismissed solely because of the negligence of the clerk of the lower court, his due process claim must fail. In Pennsylvania, errors of judicial officials can be redressed through the tort system. *Petticord v. Joyce*, 516 Pa. 35, 531 A.2d 1383 (1987).[7] This Court has repeatedly recognized that the availability of tort remedies is sufficient to satisfy due process with regard to negligent deprivations of property. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parrat v. Taylor*, 451 U.S. 527 (1981). Accordingly, there is no reason for this Court to review the Superior Court order dismissing petitioner's appeal.

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[7] Obviously, petitioner may also have a cause of action against his own attorney if that lawyer's negligence caused the dismissal of petitioner's appeal. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 260, 322 A.2d 114, 117-18 (1974) (Manderino, J., concurring).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 88-1363

In the Supreme Court of the United States

October Term, 1988

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner

vs.

STATE FARM INSURANCE COMPANY,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE INVOLVED

Rule 1926 of the Pennsylvania Rules of Appellate Procedure states:

> If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court after notice to the parties and opportunity for objection, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

ARGUMENT

I. Introduction

The essential argument of Respondent State Farm is that Petitioner violated a procedural duty under state rules, and that this justified the forfeiture of his constitutional rights [Brief in Opposition, 4]. This assumes that the state rules impose such a duty, but they do not.

The Petition for Certiorari discussed how the Pennsylvania Superior Court cited *only* Pennsylvania Appellate Rules 1921 and 1931, which impose duties *only* on the lower Court, judge and clerk [Petition, 23-26]. Instead of discussing these rules, State Farm has cited Rule 1926, "Correction or Modification of the Record." Because the Brief in Opposition failed to quote the actual language of this rule, Rule 1926 is reproduced above in its entirety.

Argument

II. Rule 1926 Provides A Mechanism For Substantive Corrections To The Record; It Does Not Impose A Duty On Parties To Supervise The Ministerial Functions Of Court Clerks

A. Nothing in Rule 1926 imposes a duty of inspection or supervision on parties.

Rule 1926 contains three sentences, which provide a wide set of options to resolve controversies which may arise with respect to the record. Each sentence assumes the existence of some dispute or question:

> "If any difference arises . . . [the record shall be corrected by the lower court]. If anything material to either party is omitted . . . [the record shall be supplemented or corrected]. All other questions as to the form and content of the record shall be presented to the appellate court."

Rule 1926 does not address the manner in which the record is indexed and numbered. Instead, it is designed to "correct misstatements or cure omissions." 1 Pennsylvania Appellate Practice §1926:1, at 513. By its terms, when this Rule is invoked, the exclusive remedy for any errors or omissions is correction.

Rule 1926 contains no suggestion that parties have an affirmative, mandatory *duty* to seek out and correct technical mistakes of the lower Court clerk, on pain of dismissal for the Court's own clerical omissions.

The Pennsylvania Superior Court did not invoke or even cite Rule 1926. In Mr. Neyhard's appeals, there was

no substantive or factual controversy about the record: both appeals were fully briefed on legal issues without any dispute about the accuracy of the record or the facts below.

B. The secondary source cited by State Farm is irrelevant.

State Farm cites, as the *only* authority for its assertion, that Mr. Neyhard had a duty to oversee the clerk's performance, the advice of a secondary source [Brief in Opposition, 4, citing 1 Pennsylvania Appellate Practice §1921:7, at 517].[1] This advice is labeled as a "practice note," following sections which describe how Rule 1926 provides a mechanism for correcting substantive errors. *Id.* §§1921:1-:6. The text's discussion does not state that counsel must monitor the lower Court clerk's formal tabulation and indexing, and certainly does not impose a duty of supervision on litigants.

This commentary describes the following remedy for an incomplete record.

> Where the record on appeal is incomplete, and the omission or omissions are material, the appellate court will either remand the case to the trial court to supplement the record, or retain jurisdiction of the case but direct that the trial court remedy the omission within a specified period of time. Where the omission is not deemed to be material, the appellate

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[1] This text was first published *after* the Superior Court ruling in this case on September 25, 1986. The publisher, Lawyer's Cooperative Publishing Company, has informally advised Petitioner's counsel that actual publication was in November or December, 1986.

court may attempt to decide the case on the basis of the incomplete record.

1 Pennsylvania Appellate Practice §1921:10, at 488-89 (footnotes omitted). Notably absent from this text is any suggestion that a party could suffer the ultimate sanction of dismissal for errors which originated with the court clerk.

III. No Tort Remedy Can Redress The Due Process Deprivation In This Case

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State Farm raises the possibility of a tort remedy against the judicial system, citing *Petticord v. Joyce*, 516 Pa. 35, 531 A.2d 1383 (1987). The fallacy in this argument is that any such remedy would be precluded by governmental immunity, codified in Pennsylvania statutes. In *Petticord*, the Pennsylvania Supreme Court noted that the defendant had failed to plead the state immunity act, and hence it would not be considered. 516 Pa. at 36 n. 2, 531 A.2d at 1383 n. 2. These statutes generally bar tort claims against government employees, whether state or local, with specified, narrow exceptions, none of which embrace the facts in this case. 42 Pa. C. S. §§8522, 8544.

The deprivation in this case, where Petitioner was denied the very quantum of Due Process defined by a state's own Constitution, statutes and Court rules, for the sole reason that a Court clerk violated those rules, is hardly comparable with the negligent loss of a prisoner's hobby kit in *Parrat v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981). The judicial process for obtaining substantive legal rulings on the merits is the essence of Due Process; its unjustified deprivation cannot be tolerated

even if money damages were available. Restoration of Mr. Neyhard's constitutional rights by this Court is the appropriate remedy.

CONCLUSION

Petitioner requests that this Court issue a Writ of Certiorari to the Pennsylvania Superior Court, so that his appeals may be reinstated and decided on their merits.

Respectfully submitted,
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